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No. 86-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The questions presented with respect to the Judgment of the D.C. Circuit are:

1. Whether the Federal Energy Regulatory Commission ("Commission") has authority under the Natural Gas Act ("NGA") to prevent a pipeline from obtaining "first sale" prices for its own production as authorized by the Natural Gas Policy Act ("NGPA") by conditioning, *ex post facto*, the right to such prices? *Public Service Commission of the State of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983) ("*Mid-La II*").

2. Whether the D.C. Circuit erred in concluding, in direct conflict with the holding of the Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC*, 780 F.2d 1238, 1244 (1986) ("*Mid-La III*"), that NGPA pricing rights were "at issue" in NGA rate cases concluded while the Commission's unlawful rulemaking orders were in effect?

3. Whether the D.C. Circuit erred in abandoning its traditional rule of withholding deference to agency interpretations of settlement agreements and, by expansion of the Supreme Court's *Chevron* decision, in adopting a new rule of deference which is in direct conflict with the Fifth Circuit and the Sixth Circuit? *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PARTIES TO THE PROCEEDINGS BELOW

The following parties were parties to the proceedings before the D.C. Circuit:

National Fuel Gas Supply Corporation;

Federal Energy Regulatory Commission;

Public Service Commission of the State of New York; and

Pennsylvania Public Utility Commission.

The Petitioner, National Fuel Gas Supply Corporation,[1] is a wholly-owned subsidiary of National Fuel Gas Company. Other wholly-owned subsidiaries of National Fuel Gas Company are: National Fuel Gas Distribution Corporation; Seneca Resources Corporation; Penn-York Energy Corporation; Empire Exploration, Inc.; Highland Land & Minerals, Inc.; and Enerop Corporation.

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[1] National is an interstate natural gas pipeline company that produces, purchases, stores, transports, and sells natural gas for resale in interstate commerce.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, National Fuel Gas Supply Corporation ("National") respectfully prays that a writ of *certiorari* issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") entered on February 20, 1987, in *National Fuel Gas Supply Corporation* v. *Federal Energy Regulatory Commission*, Nos. 84-1246 and 84-1285.

OPINIONS BELOW

The Opinion of the D.C. Circuit, issued February 20, 1987, is reported at 811 F.2d 1563. App. 1a.[2] The

[2] National has filed a separate Appendix which contains all opinions in this matter, including the Judgment below, as well as other pertinent materials. The Appendix will be referred to as "App.", followed by the appropriate page reference.

D.C. Circuit affirmed three orders issued by the Respondent Federal Energy Regulatory Commission ("Commission"), as follows: *National Fuel Gas Supply Corporation*, 26 FERC ¶61,105 (January 31, 1984);[3] 27 FERC ¶61,111 (April 20, 1984); and 28 FERC ¶61,012 (July 5, 1984).[4]

The D.C. Circuit relied on final orders of the Commission in two general rate proceedings initiated by National under Section 4 of the Natural Gas Act ("NGA"). Such orders, together with the Initial Decision underlying the first of these two general rate proceedings (App. 87a),[5] are reproduced at App. 111a and 305a, respectively.[6]

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the NGA, 15 U.S.C. 717r(b). National seeks review by the Supreme Court of the D.C. Circuit's Opinion, identified above, which was dated and entered February 20, 1987.

The jurisdiction of the D.C. Circuit was invoked under Section 19(b) of the NGA, *supra*.

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[3] The Commission's orders are published by Commerce Clearing House.

[4] National's petition for rehearing and suggestion for rehearing *en banc* was rejected and its motion to file a substitute petition was denied by the D.C. Circuit's order filed May 1, 1987. App. 84a.

[5] *National Fuel Gas Supply Corp.*, 5 FERC ¶63,017 (1978).

[6] *National Fuel Gas Supply Corp.*, 8 FERC ¶61,135 (August 6, 1979), related to "Period I", discussed, *infra*; and *National Fuel Gas Supply Corp.*, 15 FERC ¶61,058 (issued April 21, 1981), related to "Period II", *infra*.

STATUTES AND REGULATIONS

This case involves the following statutes and regulations which, because of their length, are set out *verbatim* in the Appendix accompanying this petition:

Natural Gas Act, 15 U.S.C. 717-717w:

- Sections 4, 5(a), and 19 (App. 135a, 141a, and 143a).

Regulations under the Natural Gas Act, 18 C.F.R.:

- Sections 154.38(d)(1) through 154.38(d)(4)(x) [Purchased Gas Adjustment ("PGA") regulations, App. 161a];
- Section 154.63 [general NGA Section 4 rate change regulations, App. 186a];
- Part 201, Account Nos. 795-798 [Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act] (1979) (App. 217a).

Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432:

- Section 501(a), 15 U.S.C. 3411(a) [App. 148a];
- Section 601, 15 U.S.C. 3431 [App. 150a].

Regulations under the Natural Gas Policy Act of 1978, 18 C.F.R.:

- Section 270.203 (1979) [Order No. 58, found unlawful in *Mid-La II*] (App. 205a);
- Section 154.42 (1981) [Order No. 98, found unlawful in *Mid-La II*] (App. 208a);
- Current Section 154.42 [relating to NGPA pricing of pipeline production] (App. 215a).

STATEMENT OF THE CASE

The Natural Gas Policy Act of 1978 ("NGPA") "explicitly establishes an incentive pricing scheme", effective December 1, 1978, under which "all natural gas production falls within at least one of the [NGPA pricing] categories", and "[i]n none of the . . . categories . . . is the Commission given authority to require a rate lower than the statutory ceiling." *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 333 (1983) ("*Mid-La II*"). Because of this "comprehensive" statutory scheme, the Supreme Court invalidated generic rulemaking orders, which had been made effective commencing December 1, 1978 (Order Nos. 58 and 98), in which the Commission had interpreted the NGPA to foreclose NGPA pricing of "old" gas owned by interstate pipelines.

The D.C. Circuit affirmed three Commission orders rejecting National's request, contained in a Purchased Gas Adjustment ("PGA") filing made pursuant to National's Tariff, to recover NGPA "first-sale" prices for its "old" company-owned production, for the period December 1, 1978 (the effective date of the NGPA) to June 1, 1982.[7] National made its PGA filing after the Supreme Court issued *Mid-La II* clarifying that Congress did not intend to treat gas production differently depending on who owned the production, *i.e.*, pipelines, like independent producers, were eli-

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[7] The Commission has explained that by PGA filings, "[c]hanges in purchased gas costs may take place while a final determination in a rate proceeding is pending." *Order No. 452-A*, 47 FPC 1510, 1511 (1972).

gible for "first-sale" prices for their "old" production.[8]

Between December 1, 1978 and June 1, 1982, however, presumptively valid Order Nos. 58 and 98, in conjunction with NGA regulations, operated affirmatively to require pipelines "as a matter of law" (according to the Commission)[9] to price their "old" production in NGA rate cases at levels below NGPA incentive prices, *i.e.*, at traditional cost-of-service prices.

Nevertheless, in the instant case the D.C. Circuit has affirmed Commission orders holding that National could not exercise its NGPA pricing rights for the period December 1, 1978 to June 1, 1982 because it had not affirmatively "preserved" such rights in its NGA rate proceedings.[10] In other words, it was through National's *silence* in such NGA proceedings, rather than through any knowing and deliberate act of waiver, that National is said to have lost such rights.

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[8] Section 601(b)(1)(E) of the NGPA limits amounts which pipelines pay their affiliates to the amount paid by such pipelines to independent producers in comparable transactions. National's request for NGPA pricing strictly complies with this rule of parity pricing. Accordingly, National did not request ceiling prices.

[9] *Order No. 391*, Regs. Preambles 1982-1985, FERC Stats. and Regs. (CCH) ¶30,588 at 31,086 (footnotes omitted). See App. 121a.

[10] National's "old" gas production at issue here constitutes nearly all of its company-owned production (during oral argument below, counsel for National noted that "new" gas was not at issue).

Furthermore, the D.C. Circuit, like the Commission, did not cite any statute or regulation that conditioned National's NGPA pricing rights for "old" gas to require affirmative action to preserve such rights. No doubt this was so because there was no such requirement until it was imposed, *ex post facto*, in the Commission orders here on review. Indeed, in its generic rulemaking docket the Commission had left the impression that no such preservation action was needed, for it denied a stay of its Order No. 58 pending judicial review, finding a lack of irreparable injury therefrom because the Commission "could authorize the collection of revenues denied by this provision through surcharges."[11]

Therefore, this case concerns Commission orders that perpetuate the same interpretation of the NGPA as was found to be illegal by the Supreme Court in *Mid-La II*. The D.C. Circuit has thus effectually changed the effective date of the NGPA from December 1, 1978 to June 1, 1982, and in that respect has illegally amended the NGPA.

The D.C. Circuit relied on "final orders" of the Commission in two NGA rate proceedings which established "Base Tariff Rates" for National.[12] The "Period I" order, together with its underlying Initial Decision, fixed National's Base Tariff Rates for the

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[11] "Order Granting Rehearing for Purposes of Further Consideration and Denying Stay," 6 FERC ¶61,077 at 61,151 (January 29, 1979). App. 314a.

[12] "The base tariff rate is the effective rate on file with the Commission *excluding adjustments effected pursuant to a PGA clause.*" Regulations under the Natural Gas Act, Section 154.38(d)(4), 18 C.F.R. 154.38(d)(4), App. 185a, emphasis added.

period from December 1, 1978 (the effective date of the NGPA) to October 1, 1980.[13] The "Period II" order approved a settlement which established National's Base Tariff Rates for the period from November 1, 1980 to June 1, 1982.[14]

The D.C. Circuit held that the NGPA pricing of "old" pipeline production was at issue in National's NGA rate cases, and hence that the Commission's "final orders" in such proceedings foreclosed National from exercising its NGPA pricing rights. This holding conflicts directly with the decision of the Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC,* 780 F.2d 1238 (1986) (*"Mid-La III"*).

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant a writ of *certiorari* to review the Opinion of the D.C. Circuit for the following reasons:

1. Because under the NGPA Congress unconditionally authorized "first sale" incentive prices for "old" pipeline production effective December 1, 1978, the Supreme Court should not permit the agency to abandon the rule of law by imposing, through administrative fiat, an *ex post facto* condition to the exercise of that statutory right.

2. The D.C. Circuit's brush-off of the Commission's misinterpretation of the statute as "simply . . . an

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[13] Such Base Tariff Rates applied commencing prior to December 1, 1978, but the period relevant to this case commenced on that date.

[14] *National Fuel Gas Supply Corp.*, 15 FERC ¶61,058 (issued April 21, 1981), App. 305a.

error of interpretation" will, if not corrected, encourage administrative agencies to substitute their own public policy views for those of Congress. The D.C. Circuit has failed to recognize the continuing obligation of the Commission to conform to the NGPA's mandate from its effective date and thus provide an opportunity for redress of the error.

3. The D.C. Circuit has rendered a decision in direct conflict with the decisions of other Federal Circuit Courts of Appeals on the same matter by its holdings that: (i) NGPA pricing rights were at issue in NGA rate cases concluded while the Commission's unlawful rulemaking orders were in effect [*contra,* Fifth Circuit in *Mid-La III*]; (ii) under a settlement which is not an integrated document purporting to govern all relationships between the parties, silence nevertheless constitutes a waiver of valuable economic rights [*contra,* Fifth Circuit in *Mid-La III*]; and (iii) the D.C. Circuit is required under the Supreme Court's *Chevron* decision to abandon its traditional rule of withholding deference to agency interpretations of settlement agreements and adopt a rule of deference which is in direct conflict with the Fifth Circuit and the Sixth Circuit.

4. The D.C. Circuit's expansion of the *Chevron* deference doctrine, unless corrected by the Supreme Court, will sabotage the administrative settlement process because (i) it allows one party to a settlement—the agency—to make a controlling "self-serving . . . post hoc reinterpretation of its contract," and (ii) it requires every settlement to expressly address every conceivable issue that might arise between the settlement parties at the peril of the Commission's

post hoc interpretation as to what was or what was not settled.

5. The D.C. Circuit's reliance upon inapplicable "new" gas regulations as decisional in this case, when this case involves only the pricing of National's "old" gas under the NGPA, and its resort to reasons not relied upon by the Commission in its orders, together constitute such an extreme departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

ARGUMENT

1. The D.C. Circuit's Decision Directly Conflicts with the NGPA and with the Supreme Court's *Mid-La II* Decision.

Effective December 1, 1978, the NGPA "comprehensively and dramatically changed the method of pricing of natural gas produced in the United States." *Mid-La II*, 463 U.S. at 322. The NGPA was "designed to supplant the Commission's authority [under the NGA] to establish rates for the wholesale market, the market consisting of so-called 'first sales' of natural gas." *Id.* at 331. Thus, in *Mid La II* the Supreme Court concluded that Congress did not intend to exclude pipeline production from this comprehensive statute. The Supreme Court emphasized that all gas production fell into one or another of the NGPA categories and that "[*i*]*n none of the eight categories . . . is the Commission given authority to require a rate lower than the statutory ceiling.*" *Id.* at 333 (emphasis added).

Despite the Supreme Court's decision, however, the D.C. Circuit asserts that the Commission has the au-

thority to *impose* rates lower than the statute permits for the period that its unlawful Order Nos. 58 and 98 were in effect.[15] Those orders, which were struck down in the Supreme Court's *Mid-La II*[16] decision, had held that "old" gas produced by a pipeline was *not* entitled to NGPA prices and that such gas production therefore remained subject to the Commission's cost-of-service regulation under the NGA.

After Order Nos. 58 and 98 were remanded, the Commission issued Order No. 391 in which it conceded that, once its existing regulations were invalidated, "[a]ny new regulations must be effective as of December 1, 1978, the effective date of the NGPA."[17] Yet, the D.C. Circuit has flouted the *Mid-La II* decision and has acted to perpetuate the illegal effect of Order Nos. 58 and 98.[18] In substance, the Commission has deferred the effective date of the NGPA and the will of Congress has not been carried out.

The D.C. Circuit upheld the Commission's ruling that National could not collect such prices because it had failed to act affirmatively to "preserve" its NGPA pricing rights in National's NGA rate proceedings. However, the D.C. Circuit's Opinion is devoid of any citation to the NGA, the NGPA, Commission regulations, or any other Commission order which at that

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[15]Opinion at 7.

[16] The Supreme Court affirmed the same conclusion of the Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC*, 664 F.2d 530 (5th Cir. 1981) (*"Mid La-I"*).

[17] *Supra*, at 31,095; App. 130a.

[18] The Commission has done the same thing on an industry-wide basis in Order No. 391.

time required such affirmative action by National in order to "preserve" its NGPA pricing rights. Furthermore, Congress granted NGPA pricing rights without condition.[19]

Because Order Nos. 58 and 98 exceeded the Commission's statutory authority, such regulations were a "legal nullity" during the December 1, 1978 to June 1, 1982 period:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. Á regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * *"[20]

Hence it *remained* the Commission's obligation to "carry into effect the will of Congress" pursuant to Section 501 of the NGPA because the effect of *Mid-La II* was:

> "* * * not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power

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[19] "* * * [I]t was an unreasonable construction of this comprehensive and exhaustive new legislation, contrary to its structure, purposes, and history, for the Commission to chop out virtually all pipeline production and to relegate it to discretionary regulation under the NGA. * * *" *Mid-La II*, 463 U.S. at 343, fn. 24.

[20] *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936) (citations omitted).

> to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of later decision. A statute in force when . . . [the Commission's unlawful regulations] were made cannot be made a subsequent statute through new interpretation by the courts. * * *[21]

The D.C. Circuit, noting that "* * * the Supreme Court did not require the Commission to apply the *Mid-Louisiana Gas II* decision retroactively to modify all of the final rate orders that have been entered over the years since the [NGPA] was enacted * * *," has sanctioned a delay in the December 1, 1978 effective date of the NGPA for National's "old" pipeline production because "* * * [w]ithout any such explicit command, the usual presumption is that a judicial decision should be given prospective effect except in the particular case in which the ruling is made. * * *" Opinion at 7. But, contrary to this D.C. Circuit holding:

> "* * * [i]t is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise * * *."[22]

Thus, the issue here is whether the Commission has enforced the *statute* (as contrasted with the Supreme Court's *Mid-La II* mandate) because *the Commission*

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[21] *Fleming* v. *Fleming*, 264 U.S. 29, 31-32 (1924); *accord, Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 547-48 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

[22] *Mahler* v. *Eby*, 264 U.S. 32, 44 (1924).

is without authority to do otherwise. Accordingly, the "usual presumption" relied on by the D.C. Circuit is not germane to this case.

The D.C. Circuit has affirmed action of a Commission which was *not* looking for ways to *carry out* the intent of Congress but which was doggedly continuing its efforts, first begun in Order Nos. 58 and 98, to *deny* those rights.[23] The Commission's condition which *presumes* the need for affirmative action to preserve NGPA pricing rights is contrary to the intent of Congress that NGPA pricing rights *shall be available as of December 1, 1978.*[24]

The Commission, moreover, created an *ex post facto* condition to the collection of "first sale" prices for "old" gas, such condition being that National (and every other pipeline similarly situated) must have acted affirmatively in NGA rate cases to preserve those *unqualified* NGPA pricing rights.[25] Such a condition is manifestly unlawful, both because it was imposed *ex post facto* and also because it is contrary to

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[23] Despite the Commission's action resulting in *Mid-La III, supra,* despite the Commission's action in the instant case, and despite the Commission's effort to do the same thing industry-wide in the more recent Order No. 391, the D.C. Circuit absolved the Commission from *ultra vires* motives, concluding that "* * * [t]here is no imputation that the Commission has embarked on a deliberate program to sabotage the [NGPA's] provisions or to refuse to carry out its mandates * * *." Opinion at 7.

[24] The statute is based on numerous dates which control not only the price but also the time when the Commission's regulatory authority over certain categories of gas ceases. The dates in the statute are, therefore, an integral part of the statutory scheme and must be enforced.

[25] Orders on review, as later fixed by general rule in *Order No. 391, supra.*

the NGPA, under which the Commission is without authority to "* * * require a rate lower than the statutory ceiling." *Mid-La II, supra*, 463 U.S. at 333.

National seeks a writ of *certiorari* from this Court in order to put an end to the Commission's steadfast refusal to implement the NGPA consistent with the provisions of the statute and this Court's *Mid-La II* decision.

2. The D.C. Circuit's Decision Is in Direct Conflict with the Fifth Circuit's *Mid-La III* Decision on the Same Matter.

The Fifth Circuit in *Mid-La III* rejected the Commission's arguments where the salient operative facts are identical.

More specifically, Mid-Louisiana Gas Company ("Mid-Louisiana") instituted a Section 4 rate proceeding under the NGA to fix Base Tariff Rates during the period that Order No. 58 was effective and presumptively valid.[26] Its tariff sheets instituting that rate case priced Mid-Louisiana's "old" gas following the cost-of-service method required by Commission NGA regulations for such filings.[27] In these circum-

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[26] *Mid-La III, supra*, 780 F.2d at 1240.

[27] *Ibid.* In this crucial respect, the *Mid-La III* facts are jurisdictionally different from the facts before the Fourth Circuit in *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 2702 (1985). In *Consolidated*, the pipeline had initiated its NGA rate cases with tariff sheets claiming NGPA prices for "old" gas. 745 F.2d at 285 (the first period); and 22 FERC ¶61,120 at 61,181 (1983) (the second period). In each case, the Commission had rejected those tariff sheets. *Id.* Consolidated, having put the issue of NGPA pricing "in play" in its NGA rate cases (in defiance of Order No. 58), obviously was "aggrieved" and had an obligation under NGA Section 19 to follow through to preserve its rights.

stances, the Fifth Circuit held that "* * * Mid Louisiana's statutory right to reprice its company-owned production at NGPA rates was simply not at issue in the . . . section 4 rate case, * * *"[28] and that, accordingly, the final order in the NGA case did not speak to that matter.

Thus, the D.C. Circuit's holding that National's NGPA pricing rights were at issue in National's Period I and Period II rate cases conflicts with the *Mid-La III* decision of the Fifth Circuit holding that in such cases NGPA rights were "simply not at issue."

Further, as in National's Period II rate case, Mid-Louisiana's Section 4 rate case concluded in a settlement. The *Mid-La III* settlement agreement contained "disclaimer" language limiting its scope to matters set forth in such agreement.[29] The settlement did not address NGPA pricing rights one way or the other. Because NGPA pricing rights were not at issue, the Fifth Circuit refused to accept the Commission's argument that Mid-Louisiana, by reason of the silence of the settlement, had waived its NGPA pricing rights. The Fifth Circuit thus refused to neuter the settlement "disclaimer" language as the D.C. Circuit did here.

According to the Fifth Circuit, "* * * [t]he Commission based its denial of NGPA prices on the 1981

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[28] *Mid-La III, supra*, 780 F.2d at 1244.

[29] "* * * This clause provides that 'except as expressly stated herein, no party shall be deemed to have approved, accepted, agreed, or consented to any rate-making or tariff principle or any method of cost of service determination . . . underlying or supposed to underlie any of the rates, refunds, or future adjustments to rates provided herein.' * * *" 780 F.2d at 1244.

settlement agreement . . . [holding that] Mid Louisiana had bargained away its right to reprice its pipeline production . . . by failing to specifically preserve that right in the settlement agreement itself." *Id.* at 1242. This Commission argument, rejected by the Fifth Circuit, is the identical Commission argument which the D.C. Circuit embraced in the instant case.

Moreover, the Fifth Circuit noted that the settlement agreement "* * * plainly shows that Mid Louisiana's company-owned production was priced on a cost-of-service basis. * * *" *Id.* at 1243. Nevertheless, the Fifth Circuit held that:

> "* * * Absent an integrated document purporting to govern all relationships between the parties, . . . silence will not be taken to indicate relinquishment of a valuable right. *Mobil Oil*, 570 F.2d at 1025; *Texas Gas Transmission*, 441 F.2d at 1396."
>
> * * * * *
>
> "* * * Settlements pertain only to those issues which they specifically resolve . . . [and] cannot be construed as having general application even to arguably analogous issues which the agreement does not purport to cover.' * * *."[30]

In this case—also involving a non-integrated settlement—the D.C. Circuit held on the same facts that

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[30] *Mid-La III*, *supra*, 780 F.2d at 1244. Indeed, the D.C. Circuit's holding to the contrary departs from its own prior precedent. *Mobil Oil Corp.* v. *FPC*, 570 F.2d 1021, 1025 (D.C. Cir. 1978).

National's NGPA pricing rights were at issue and were waived by the settlement's silence.[31]

The Fifth Circuit also held that Mid Louisiana was bound by the prevailing Commission regulations when it followed cost-of-service pricing in its Section 4 rate case under the NGA:

> "Though the settlement . . . was negotiated in a period of legal uncertainty regarding a pipeline's rights under the NGPA, Mid Louisiana was nevertheless bound by effective Commission regulations when it filed its proposed tariff sheets in that rate proceeding. [Citations omitted] One such regulation, Order No. 58, required that 'old' company-owned production be priced on a cost-of-service basis. Had Mid Louisiana and its customers not reached a settlement, the pipeline's rates would have been set by the Commission after a hearing, utilizing cost-of-service pricing for company-owned 'old' gas.

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[31] Indeed, in a self-contradictory finding, the D.C. Circuit found, on the one hand, that the "* * * Commission concluded that the settlement *addressed* the issue of whether to value NFGS' own gas on a cost-of-service basis * * *" (Opinion at 10; 18-19; 20, emphasis added) but, on the other hand, that the settlement's "*complete failure to mention this issue* constituted [National's] implicit" waiver of its NGPA pricing rights (*Id.* at 19, emphasis added). In fact, the Commission did *not* conclude that the settlement addressed the issue "of whether to value National's own gas on a cost-of-service basis." Rather, the Commission merely recited the *fact*, as did the Fifth Circuit in *Mid-La III* when it reached the opposite conclusion (780 F.2d at 1243), that "National Fuel included costs in the settlement agreement reflecting cost-of-service pricing for all of its pipeline production." 27 FERC at 61,210; App. 49a.

> The rates ultimately settled upon were not transfigured by the happenstance that they were arrived at through an agreement, rather than through government action. In basing its rates on its cost-of-service, Mid Louisiana was simply adhering to Commission regulations that were binding at that time." 780 F.2d at 1244.

In contrast, the D.C. Circuit concluded that it was "not strictly correct" that National was "bound [by the NGA regulations] to accept cost-of-service valuation of its own gas production . . . ."[32] Rather, it concluded that National had waived its rights through the silence of the settlement on this issue.[33]

The D.C. Circuit did concede that its reading of the settlement to infer a waiver from silence had one "real difficulty", namely, a reconciliation of the D.C. Circuit's reading with the settlement's general disclaimer stating that "no party to this proceeding shall be deemed to have waived any claim or right which it may otherwise have with respect to any mat-

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[32] Opinion at 19. The D.C. Circuit plainly did not consider the mandatory nature of the *NGA* regulations requiring cost-of-service pricing (18 C.F.R. 154.63) because it answered National's argument, which was predicated on mandatory *NGA* regulations, by reference to *NGPA* regulations (it said, "if those regulations were later overturned by the Courts").

[33] Further, the D.C. Circuit did not mention its virtually simultaneous and contrary *Jersey Central* decision in which it held that the imputation of a waiver of rights through silence is "* * * unfair since . . . one must read into the filing an *implied* waiver of statutory . . . rights. * * *" *Jersey Central Power & Light Co.* v. *FERC*, 810 F.2d 1168, 1185 (D.C. Cir. 1987), emphasis added.

ters not expressly provided for herein." Opinion at 19-20. But, begging the issue, the D.C. Circuit dismissed this "difficulty" as "insufficient to constitute an express reservation of a right to make retroactive adjustments in these rates," again relying on its finding, conflicting with that of the Fifth Circuit, that:

> "* * * the matter of how to value [National's] gas production is 'expressly provided for' in the agreement * * *" (*Id.* at 20).

The D.C. Circuit purported to corroborate its neutering of the settlement's disclaimer language by pointing to what it characterized as "a very important reason", namely, the fact that, as to three separate issues, express reservations of rate-changing rights had been included in the settlement. Opinion at 20. In resorting to this analysis, however, the D.C. Circuit, as with its assertion that National's pricing rights were at issue (fn. 31, *supra*), again strayed beyond the Commission's own findings, thereby violating the rule of *Chenery* which "* * * requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself * * *."[34]

Beyond that, the D.C. Circuit erred by failing to realize that, unlike NGPA pricing rights which were *not* at issue, the matters expressly reserved in the settlement *were* at issue in National's NGA rate case. Indeed, if the settlement had not expressly provided

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[34] *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962), citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). It may be noted that the D.C. Circuit's action was inconsistent with its own recent Jersey Central decision, where the D.C. Circuit derogated an argument which "* * * was never advanced by the Commission." *Supra*, 810 F.2d at 1182-83.

for the three separate issues, the Base Tariff Rates in that NGA rate case could not have been modified without National filing an entirely new rate case. See 18 C.F.R. 154.63, *infra*, App. 186a.

Moreover, the D.C. Circuit ignored the fact that the settlement, which fixed "base tariff rates" for National,[35] contained a provision which explicitly allowed PGA filings for changes in the price of gas.[36]

National submits that the D.C. Circuit has approved a Commission requirement that is nothing less than an after-the-fact bar to National's NGPA pricing rights for its "old" gas production. As such, the D.C. Circuit has entered a Judgment which directly conflicts with the Fifth Circuit's *Mid-La III* decision.

3. The D.C. Circuit's Opinion Misapplied the Supreme Court's *Chevron* Rule of Judicial Deference.

The D.C. Circuit relied on the Supreme Court's *Chevron* decision as requiring deference to the Com-

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[35] Article I, *infra*, App. 232a.

[36] In Article III of National's settlement, cost of gas surcharge adjustments pursuant to National's PGA tariff provisions were expressly allowed:

"Section 2. The [base tariff] rates provided for in Section 1, above, *as changed from time to time pursuant to National Fuel's FERC Gas Tariff* and this Stipulation and Agreement, shall remain in effect until the termination * * *." *Infra*, App. 239a, (emphasis added).

National's Tariff, in Section 17 of its General Terms and Conditions, provides for PGA surcharge adjustment filings (see *infra*, App. 284a). Despite this express settlement provision, the D.C. Circuit totally ignored it and erroneously held that: "* * * the disclaimer only preserves rights that NFGS 'may otherwise have,' but we have been unable to identify any other grounds for [National] to claim such a right." Opinion, at 20.

mission's interpretation of the settlement agreement in National's NGA rate case for Period II. The D.C. Circuit held that:

> "* * * [b]y far the most important [reason for according such deference] is that the Supreme Court's decision in *Chevron* . . . has rejected the view that a court may freely review an agency on pure questions of law. * * *" Opinion at 11.

Elaborating, the D.C. Circuit held:

> "* * * that *Chevron* has implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation. *See, e.g., Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268)70 (1960) (upholding de novo review of an agency's interpretation of a contract). * * * In *Chevron*, by contrast, the Court recognized that where Congress has made an explicit or implicit grant of power to an agency over certain matters, that grant of power embodies congressional recognition of the agency's 'special competence' to handle those matters, and compels deference from the courts in reviewing how that power is exercised. * * *" *Id.* at 13-14.

The D.C. Circuit acknowledged that its holding conflicts with the rule of law in other Circuits—in particular, the Fifth Circuit's *Mid-La III* decision and the Sixth Circuit's *Cincinnati Gas* decision.[37]

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[37] Opinion, at 10, citing *Cincinnati Gas & Electric Co.* v. *FERC*, 724 F.2d 550, 554 (6th Cir. 1984).

The D.C. Circuit's application of *Chevron* represents an unwarranted expansion of the deference principles established in that case. First, *Chevron* involved an agency's interpretation of a statute. While it may be fair to presume that an agency is impartial in interpreting a statute to fill a legislative gap, this case does not involve the interpretation of a statute.

Rather, this case involves an agency interpretation of a settlement. The Commission is required to be actively involved in the approval of settlements which conclude litigation before it—for example, in granting such approvals the Commission often modifies or conditions the settlement. Consequently, once the Commission approves a settlement it cannot be fairly characterized as a disinterested party.

The D.C. Circuit admitted that "* * * if the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract. * * *" Opinion at 17. However, the D.C. Circuit went on to hold that the Commission is not a party to a settlement once it is approved. Opinion at 17.

The D.C. Circuit thus breezed past earlier precedents, such as its own *Mobil* opinion, holding that:

> "* * * because the Commission as *party to the settlement* was bound by it [citations to the Sixth Circuit, D.C. Circuit, and Tenth Circuit omitted], the Commission must, at least in the absence of special circumstances, comply with the settlement * * *."[38]

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[38] *Mobil Oil Corp.* v. *FPC, supra*, 570 F.2d at 1026 (emphasis

Case law in three Circuits thus clearly establishes that the Commission is a party to the settlement, having obligations the same as any other party. Hence, if the D.C. Circuit's expansion of the *Chevron* doctrine is allowed to stand it will change the law and for the first time vest in only one of the settlement parties (the Commission) a unilateral right to "advance self-serving views * * * in a post hoc reinterpretation of its contract."

The unreasonableness of the D.C. Circuit's holding is manifest in the circumstances of this case. Here, the Commission adopted an "interpretation" of the settlement's *silence* that effectively breathed new life into the Commission's unlawful interpretation of the NGPA as contained in Order Nos. 58 and 98. The Commission was not exercising special expertise which Congress entrusted to that agency. Rather, on its face the Commission's interpretation reflects:

> "* * * the danger that an agency, having reached a particular result [in Order Nos. 58 and 98], may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. * * * *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 . . . (1962)."[39]

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added), citing *Texas Gas Transmission Corp.* v. *FPC*, 441 F.2d 1392, 1394 (6th Cir. 1971); *Tennessee Gas Pipeline Co.* v. *FPC*, 504 F.2d 199, 202 (D.C. Cir. 1974); and *Continental Oil Co.* v. *FPC*, 373 F.2d 96 (10th Cir. 1967).

[39] *Food Marketing Institute* v. *ICC*, 587 F.2d 1285, 1290 (1978).

The Commission has shown that it was deeply and openly antagonistic to allowing pipelines to receive NGPA incentive prices for their "old" pipeline production. Its "expertise" on that question had been completely destroyed. The Commission's *ultra vires* conduct thus infected the very areas which Congress entrusted to the Commission's care, casting a *prima facie* shadow on the Commission's interpretation of the Period II settlement.

The instant case clearly illustrates the unsoundness of expanding the *Chevron* doctrine to require deference to agency interpretations of settlements. National therefore asks the Supreme Court to correct the D.C. Circuit's error in expanding the *Chevron* rule of judicial deference.

4. The D.C. Circuit's Decisional Reliance upon Inapplicable "New" Gas Regulations and upon Unsupported Findings Requires the Exercise of the Supreme Court's Power of Supervision.

The bases for the D.C. Circuit's Judgment relating to Period I were a Commission "final order" that ruled only on National's "new" gas and Commission regulations relating only to "new" gas, even though the issue here relates only to National's "old" pipeline production. Opinion at 8-9, 19.

a. The Commission's Period I Order.

The D.C. Circuit held that in National's Period I case the Commission had ruled that "* * * National Fuel's own production . . . should be priced on a cost of service basis rather than on the basis of applicable nationwide rates * * *" (Opinion, at 8-9, citing the Commission's Period I final order at 8 FERC ¶61,135, 61,517); and that "* * * [t]he magnitude of the various

service costs that went into valuing this gas were fully considered and determined in the proceedings that culminated in that [Period I] order, and the purchased gas adjustment procedures simply cannot be invoked to modify those determinations at this point." *Id.* at 9.

However, the excerpt from the Commission's "final order" relied on by the D.C. Circuit *was not* a Commission ruling related to National's "old" gas. Rather, the Commission's specific ruling was to affirm the Initial Decision of the Administrative Law Judge ("ALJ"). The ALJ's Initial Decision, in turn, related only to the issue of the pricing of the "new" gas portion of National's company-owned gas production, *i.e.*, only 5% of the total.[40]

b. The Commission's "New" Gas Regulations.

Erroneously relying on "new" gas regulations of the Commission, the D.C. Circuit found that National's "old" gas "conceivably could have been" priced "on the basis of area or nationwide rates" during the Period I rate case (Opinion, at 8), and that National "could have sought to value this ["old"] gas at higher prices, but did not" (*Id.* at 9). The D.C. Circuit mis-

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[40] *National Fuel Gas Supply Corporation*, Docket Nos. RP76-96, *et al.*, 5 FERC ¶63,017, 65,148-49, 65,154, fn. 522 (1978). In his initial decision, the ALJ correctly stated that "[o]f the 8,446,100 Mcf [of National's total production] involved, [the Staff witness] Fisher estimated that 494,700 Mcf would qualify for national rate treatment. . . ." 5 FERC at 65,148. The method of pricing the "old" gas—the other 8 million Mcf—was totally governed by the Commission's NGA regulations requiring cost-of-service pricing of such gas and was not a "reserved issue" decided in the Initial Decision or in the final order of the Commission.

apprehended that under the Commission's *NGA* regulations National was *not* free to elect the method of pricing its "old" gas in general rate cases under Section 4.

The Commission recently summarized the historical ratemaking treatment accorded to pipeline production, as follows:

> "Under the NGA, the Commission developed a regulatory program under which it determined the cost (or value) of a pipeline's own production in one of two ways. Production of the pipeline's 'old gas' was valued on a cost-of-service basis . . . . The valuation of the pipeline's new gas production was based on the applicable area or nationwide rates (established by the Commission), which independent producers were permitted to charge for the gas they produced and sold.
>
> * * * * * * *
>
> "Initially, the Commission interpreted the language of the NGPA to prohibit most pipeline production from qualifying *as a matter of law* for the NGPA first sale prices [referring to Order Nos. 58 and 98]. Therefore, the Commission *required* interstate pipelines *to continue pricing their old gas . . . on a cost-of-service basis, not at NGPA levels.*"[41]

Thus, when it issued its Order No. 58 the Commission effectuated its unlawful interpretation of the NGPA by *continuing the effectiveness* of the historical NGA

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[41] *Order No. 391, supra,* at 31,086, emphasis added (footnotes omitted). See App. 126a-128a.

regulations requiring cost-of-service pricing for "old" pipeline production. The D.C. Circuit therefore patently erred in concluding that National could have priced its "old" gas at NGPA levels during the period that Order Nos. 58 and 98 were binding "as a matter of law".

c. The Need for Supreme Court Supervision.

The D.C. Circuit's errors of law, outlined above, have worked to deny National the fair and reasoned judicial review required by Section 19(b) of the NGA.[42] The D.C. Circuit's misplaced reliance on "new" gas authorities is an analysis that "* * * refutes a position that no one advocates. * * *"[43] Moreover, as we have noted, the D.C. Circuit has supported its decision with findings that the Commission did not rely upon.

The D.C. Circuit's conclusion that the "final orders" in National's NGA rate cases foreclosed National's right to NGPA pricing for its "old" gas is fundamentally flawed. Thus, when Congress enacted the NGPA it obviously became essential to the implementation of the new statutory pricing scheme for the Commission to allow changes in the pricing of pipeline production. If the Commission had properly discharged its responsibility, therefore, cost-of-service Base Tariff Rates prevailing under "final" rate orders as of December 1, 1978 would have been "reopened" to the extent necessary to implement the legislative intent. The delay in that process, resulting from the Commission's unlawful rulemaking orders, does not cast any different light on the process. The Commis-

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[42] See also *SEC* v. *Chenery Corp., supra*, 332 U.S. at 196.

[43] *Mid-La II, supra*, 463 U.S. at 340.

sion remains obligated—now as before—to effectuate the December 1, 1978 statutory effective date.

The D.C. Circuit has spoken to the need for Court supervision in relation to actions of administrative agencies, especially where it appears,

> "* * * from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making. * * *"[44]

National submits that the D.C. Circuit's opinion reveals such danger signals and, therefore, the Supreme Court should exercise its supervisory powers.

CONCLUSION

For the reasons identified and explained above, National submits that its petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN T. KETCHAM,
Counsel of Record

May 21, 1987

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[44] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

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No. 86-___

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MAY 21 1987
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1246

NATIONAL FUEL GAS SUPPLY CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
INTERVENORS

No. 84-1285

NATIONAL FUEL GAS SUPPLY CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
INTERVENOR

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued March 26, 1986

Decided Februarv 20, 1987

George L. Weber, with whom *John T. Ketcham* and *Joseph O. Fryxell* were on the brief for petitioner.

John N. Estes, III, Attorney, Federal Energy Regulatory Commission, for respondent. *William H. Satterfield*, General Counsel, *Jerome M. Feit*, Solicitor, and *Thomas E. Hirsch, III*, Attorney, Federal Energy Regulatory Commission, were on the brief for respondent. *Barbara J. Weller* and *Leslie J. Lawner*, Attorneys, Federal Energy Regulatory Commission also entered appearances for respondent.

David D'Alessandro, with whom *David E. Blabey* and *Richard A. Solomon* were on the brief for intervenor Public Service Commission of the State of New York.

James P. Melin, *John F. Povilaitis* and *Charles F. Hoffman* were on the brief for intervenor Pennsylvania Public Utility Commission.

Before: EDWARDS, BORK and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: The National Fuel Gas Supply Corporation ("NFGS") appeals from three orders of the Federal Energy Regulatory Commission that denied its request for a retroactive rate increase. NFGS seeks an increase in the rates it charged for selling certain natural gas in interstate commerce between December 1, 1978, and May 31, 1982. We affirm the decision of the Commission.

I.

The natural gas NFGS sells in interstate commerce comes from two sources. Most of it is purchased by NFGS from independent or affiliated producers; a relatively small amount is produced by the company itself. Under the current regulatory scheme, the price that

NFGS can charge for its gas is largely dependent on the costs it incurs to obtain the gas.

NFGS bases its request for a retroactive rate increase on a decision of the Fifth Circuit Court of Appeals, subsequently affirmed by the Supreme Court, which construed some of the pricing provisions in the Natural Gas Policy Act of 1978. *See Mid-Louisiana Gas Co.* v. *FERC*, 664 F.2d 530 (5th Cir. 1981) (*"Mid-Louisiana Gas I"*), *aff'd in part and vacated in part sub nom. Public Serv. Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983) (*"Mid-Louisiana Gas II"*). The Act established a new pricing schedule that allowed companies to recover higher costs for "first sale" gas than for other categories of gas. *See* 15 U.S.C. §§ 3301-3332 (1982). Immediately after the Act was passed, the Commission issued implementing regulations that prohibited most gas produced and sold by a single company from being priced at the higher levels that the Act established for "first sale" gas, which comprises most gas that is purchased from independent or affiliated producers and then resold in interstate commerce. *See* Proposed Regulations, 43 Fed. Reg. 53,270, 53,280, 53,332-33 (Nov. 15, 1978); Interim Regulations, 43 Fed. Reg. 56,448, 56,461-63, 56,549-50 (Dec. 1, 1978); Final Rule Governing the Maximum Lawful Prices for Pipeline, Distributor, or Affiliate Production, 44 Fed. Reg. 66,577 (Nov. 20, 1979), *reh'g denied*, 45 Fed. Reg. 67,083 (Oct. 9, 1980) (codified as amended at 18 C.F.R. § 270.203 (1983)). The two court decisions, however, rejected the Commission's definition of "first sale" gas. The Supreme Court held that the Act's higher ceiling prices applied to gas produced and sold by a single company.[1]

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[1] The new schedule of higher prices under the Act apply only to "first sale" gas. The term "first sale" is defined as follows:

> (A) General rule
>
> The term "first sale" means any sale of any volume of natural gas—

NFGS seeks an increase in rates it had charged in compliance with the Commission's now-invalidated interpretation of the statute. After the Fifth Circuit had

---

(i) to any interstate pipeline or intrastate pipeline;

(ii) to any local distribution company;

(iii) to any person for use by such person;

(iv) which precedes any sale described in clauses (i), (ii), or (iii); and

(v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.

(B) Certain sales not included

Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

15 U.S.C. § 3301(21) (1982).

The term "first sale" gas is somewhat confusing because it refers not to gas that is initially sold, but to gas that is resold after previously having been the subject of a "first sale" as defined in the Act. The Commission had refused to classify most gas produced and sold by a single company as "first sale" gas because such gas was sold *initially* to the company's customers and had not been subject to any antecedent "first sale." The Fifth Circuit and the Supreme Court rejected this position, finding that Congress intended such gas to be treated as "first sale" gas, which the courts achieved by calling the intracorporate transfer of the gas between the production division of the company and the transportation division of the company the "first sale" that preceded the eventual sale of the gas to the company's customers. *See Mid-Louisiana Gas I*, 664 F.2d at 535-37, *aff'd in part and vacated in part, Mid-Louisiana Gas II*, 463 U.S. at 327-43 (Commission is obligated to treat either the intracorporate transfer or the downstream transfer to consumers as a "first sale"). That reversal of the Commission is the basis of NFGS's claim that it is now entitled to a retroactive rate increase.

reversed the Commission, NFGS filed for a purchased gas adjustment with the Commission. NFGS sought prospective recovery of the Act's higher "first sale" prices on all gas that the company itself produced and sold after June 1, 1982. The company also claimed the right, which it subsequently tried to exercise, to collect through a retrospective surcharge the same higher prices on all gas that the company itself had produced and sold between December 1, 1978, and June 1, 1982.

In considering NFGS's request for a retroactive rate adjustment, the Commission divided the pertinent span of time into two parts. For the period from December 1, 1978, to October 31, 1980 ("Period I"), NFGS's rates had been set in a final order entered by the Commission. *National Fuel Gas Supply Corp.*, 8 F.E.R.C. (CCH) ¶ 61,135 (Aug. 6, 1979). The Commission denied any retroactive adjustment of these rates because they were fixed in a final adjudication in which the Commission heard and decided all of the issues raised by NFGS. In particular, NFGS did not raise or reserve the issue of how "first sale" gas should be priced under the Act during any of the proceedings that led up to this final order. *See National Fuel Gas Supply Corp.*, 27 F.E.R.C. (CCH) ¶ 61,111, at 61,210 (Apr. 20, 1984), *modifying* 26 F.E.R.C. (CCH) ¶ 61,105 (Jan. 31, 1984), *reh'g denied*, 28 F.E.R.C. (CCH) ¶ 61,012 (July 5, 1984). For the period from November 1, 1980, to June 1, 1982 ("Period II"), NFGS's rates had been established in a settlement reached with its customers and approved in an order entered by the Commission. *National Fuel Gas Supply Corp.*, 15 F.E.R.C. (CCH) ¶ 61,058 (Apr. 21, 1981). The Commission denied any retroactive adjustments in these rates because it read the settlement order as failing to preserve any right for NFGS to object to these rates later on the grounds that "first sale" gas had been priced improperly under the Act. *See National Fuel*, 27 F.E.R.C. (CCH) at 61,210-12. We consider the two periods in turn.

II.

We think the Commission was correct in denying retroactive adjustment for Period I. Those rates were set by an order of the Commission after a proceeding in which all controverted matters were briefed and argued. When NFGS did not file for rehearing of this decision, it became a final order. *See* 15 U.S.C. § 717r(a) (1982). If NFGS wished to contest the Commission's position on what constituted "first sale" gas under the Act, it could have done so before the Commission and, if it did not get satisfaction there, could have brought its contentions before the courts, as did the Mid-Louisiana Gas Company that ultimately prevailed on this issue before the Supreme Court. But NFGS did nothing either to raise this issue itself or to reserve the issue in light of the pending challenges that other parties had brought in other proceedings. The challenge to the Commission's order several years after it became final and effective comes too late. *Cf. City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958) (Congress may prescribe the procedures and conditions under which review of administrative orders may be had, and Congress has stated that all objections to a final Commission order must be made on direct review in the appellate court or not at all).

NFGS offers three objections to this conclusion. First, it argues that it could not raise the "first sale" issue in the Period I ratemaking because the law was not changed in its favor until after that ratemaking had concluded. On this point, NFGS notes that the hearing record in the rate case for Period I closed on April 27, 1978, several months before the Act was passed on December 1, 1978. This argument ignores the fact that the Commission's order setting the rates for Period I was not entered until nine months later, on August 6, 1979. NFGS could have tried to raise this new point during those nine months, or it could have sought rehearing of the

Commission's decision after the order was entered. These avenues afforded ample opportunity to raise the "first sale" issue, but NFGS failed to pursue them and by that failure became subject to the jurisdictional bar. *See Midwestern Gas Transmission Co.* v. *FERC*, 734 F.2d 828, 832 (D.C. Cir. 1984).

Second, NFGS argues that it must be permitted to recover retroactively the higher ceiling prices that the Act allows for "first sale" gas, if the Supreme Court's decision in *Mid-Louisiana Gas II* is to be given its proper effect and if the Commission is to be held to its statutory duty to "carry out" the terms of the Act. 15 U.S.C. § 3411(a) (1982). But this is not so. To begin with, the Supreme Court did not require the Commission to apply the *Mid-Louisiana Gas II* decision retroactively to modify all of the final rate orders that have been entered over the years since the Act was enacted. Without any such explicit command, the usual presumption is that a judicial decision should be given prospective effect except in the particular case in which the ruling is made. There is no imputation that the Commission has embarked on a deliberate program to sabotage the Act's provisions or to refuse to carry out its mandates; the Commission simply committed an error of interpretation. In addition, the usual presumption is even more to the point here because nothing in the Act or the Supreme Court's decision *requires* that all "first sale" gas be priced at the ceiling prices set out in the Act. Those are "ceiling" prices only, and for any number of reasons, including representations of customers, a company or the Commission may decide that some "first sale" gas should be priced at lower rates than the Act permits. In particular, in this case NFGS's filing for Period I valued its own production merely at cost-of-service rates, and not at the highest rates that were available even before the Act was passed. The Commission accepted NFGS's valuation, which became the basis for the Period I rate order.

See National Fuel Gas Supply Corp., 5 F.E.R.C. (CCH) ¶ 63,018, at 65,148-49 (Nov. 14, 1978).

Finally, NFGS argues that it was entitled to a retroactive rate adjustment because its request complies with the Commission's established procedures for allowing purchased gas adjustments. These procedures essentially allow a company to modify a final rate order if it can show that the cost of its purchased gas has changed since that order was entered. In particular, the purchased gas adjustment procedures apply where the cost of a company's gas is valued on the basis of area or nationwide rates, as was often done prior to the Act, or if the cost of the gas is valued on the basis of the ceiling prices set out in the Act. These bases for valuing the cost of a company's gas often change quite abruptly over the duration of a rate order, and the special procedures for a purchased gas adjustment permit the company's rates to be modified expeditiously when such changes occur.

In this instance, NFGS seeks a purchased gas adjustment to Period I rates for gas that was valued not on any of these bases, but on a cost-of-service basis. The Commission's practice, however, does not allow a purchased gas adjustment for gas that a company itself produced and that was valued on a cost-of-service basis; it only permits adjustments to be made to a company's rates that reflect "changes in its cost of *purchased* gas." Purchased Gas Cost Adjustment Provision in Natural Gas Pipeline Companies' FPC Gas Tariffs, 47 F.P.C. 1049, 1053 (1972) (emphasis added); *see* Final Regulation, 43 Fed. Reg. 56,031, 56,033 (Nov. 30, 1978) (codified at 18 C.F.R. § 154.38 n.1 (1979)). If NFGS's own gas production had been valued on the basis of area or nationwide rates, as it conceivably could have been, then the procedures for a purchased gas adjustment might have been applicable. But the Commission ruled in its rate order for Period I—and NFGS accepted its ruling—that "National Fuel's own production . . . should be priced on a

cost of service basis rather than on the basis of applicable nationwide rates." *National Fuel*, 8 F.E.R.C. (CCH) at 61,517. The magnitude of the various service costs that went into valuing this gas were fully considered and determined in the proceedings that culminated in that order, and the purchased gas adjustment procedures simply cannot be invoked to modify those determinations at this point.

NFGS formulates one last argument in an attempt to avoid this conclusion. It claims that the "first sale" provisions of the Act, as subsequently clarified in the courts, implicitly reclassified the company's own gas production as "purchased" gas, thus that the Act itself requires the Commission to permit modification of the prior valuation of this gas under the purchased gas adjustment procedures. This argument is essentially a more complicated reprise of NFGS's earlier arguments that the judicial interpretation of the Act should be applied retroactively and that the company should not be bound by its failure to contest the Commission's order valuing this gas on a cost-of-service basis. As we have noted, a purchased gas adjustment is merely a procedural device to update a rate order when the prices that underlie its valuations have changed. Here NFGS asserts not that those prices have changed, but that the Act has changed the entire valuation scheme. Although that assertion is correct, it does not justify using this procedural mechanism to overturn final rate orders that were entered under Commission rules that were valid at the time, particularly since at the time NFGS could have sought to value this gas at higher prices, but did not. We cannot read into the Act commands that do not appear in its text and were not contemplated by Congress.

III.

Unlike the rates for Period I, which were fully adjudicated before the Commission, the rates for Period II were set in a settlement that NFGS and its customers reached

and that the Commission approved. This difference is important: while NFGS is required to contest a point it wishes to preserve in an adjudicatory proceeding, the settlement either may have reserved the issue or simply may not purport to cover the issue. The question of whether the Commission erred in denying any rate increase for Period II thus depends on the correctness of the Commission's reading of the settlement agreement. The Commission concluded that the settlement addressed the issue of whether to value NFGS's own gas production on a cost-of-service basis, and that NFGS did not reserve any right to reprice this gas if it were later found to be "first sale" gas under the Act. *See National Fuel*, 27 F.E.R.C. (CCH) at 61,210-12.

The threshold issue is whether a court should give any deference to an agency's reading of a settlement agreement. The federal appellate courts have taken different positions. The view that a court should give no deference to an agency's reading rests on the traditional rule that a court may freely review an agency on questions of law. Where an agency's reading "relies solely on the language of the settlement agreement itself, rather than on any technical or factual expertise," the interpretation of that language is solely a question of law, and no deference is appropriate. *Mid Louisiana Gas Co.* v. *FERC*, 780 F.2d 1238, 1243 (5th Cir. 1986) (*"Mid Louisiana Gas III"*); *see also Cincinnati Gas & Elec. Co.* v. *FERC*, 724 F.2d 550, 554 (6th Cir. 1984). The second view holds that even on matters of pure interpretation the agency "is entitled to deference" and its conclusions will carry "great weight" because the agency is "unmistakably possessed . . . of special expertise." *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281, 291 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 2702 (1985); *see also Amoco Prod. Co.* v. *FERC*, 765 F.2d 686, 690 (7th Cir. 1985) (a court must give "some deference" to the agency's interpretation of a contract).

In this circuit, the issue has been approached in a variety of ways. In a number of cases, particularly those in which this court reviews actions taken by the Federal Energy Regulatory Commission, a rule of deference has been stated. *See, e.g., Southern Cal. Edison Co.* v. *FERC*, 805 F.2d 1068, 1072 (D.C. Cir. 1986) (agency interpretation of a contract "is entitled to considerable deference from the generalist judiciary"); *Papago Tribal Util. Auth.* v. *FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (according "appropriate deference" to "the expert agency that deals with such contracts regularly"), *cert. denied*, 467 U.S. 1241 (1984). On other occasions, however, this court has refused to defer to an agency's interpretation of a contract. *See, e.g., Lowey* v. *Watt*, 684 F.2d 957, 965 (D.C. Cir. 1982) (no deference where agency's interpretation is "explicitly based on principles of contract interpretation"). This court has also suggested the appropriate standard of review may depend on the factual context, with deference being more appropriate where issues of fact or policy are involved, *see, e.g., North Atlantic Westbound Freight Ass'n* v. *Federal Maritime Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968), or where technical knowledge is required, *see, e.g., Lowey*, 684 F.2d at 965; *Columbia Gas Transmission Corp.* v. *FPC*, 530 F.2d 1056, 1059 (D.C. Cir. 1976).

We believe that the correct view requires a court to give deference to an agency's reading of a settlement agreement even where the issue simply involves the proper construction of language. There are several reasons for this conclusion. By far the most important is that the Supreme Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has rejected the view that a court may freely review an agency on pure questions of law. *Chevron* considered the proper standard for judicial review of an agency's statutory interpretation, and the construction of a statute has always been considered a "pure" question of law. Yet the

Court held that unless Congress has "directly addressed the precise question at issue, the court does not simply impose its own construction on the statute," but must consider instead "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Court was even more emphatic in a footnote to this discussion, stating that a court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, *or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.*" *Id.* at 843 n.11 (emphasis added).

The *Chevron* Court noted that Congress delegates to an agency the power to administer a congressionally created program. When Congress leaves gaps in the program, either explicitly by authorizing the agency to adopt implementing regulations, or implicitly by enacting an ambiguously worded provision that the agency must interpret, it has explicitly or implicitly delegated to the agency the power to fill those gaps. That delegation requires the courts to defer to an agency's decision about how to exercise its power. 467 U.S. at 843-44; *see also id.* at 865-66 (it is appropriate for an agency, not a court, to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities").

In *Chevron*, the delegation of power to the agency was implicit; it was hypothesized from the text of an ambiguous statute. By contrast, the delegation of adjudicative authority to an agency that is empowered to hear disputes, receive settlement proposals, and enter binding orders is explicit—it closely resembles a direct congressional authorization to implement the provisions of a statute through regulations. In this case, for example, Congress has specifically delegated to the Commission a broad range of adjudicative powers over natural gas rates. All rates and

charges must be filed with the Commission, 15 U.S.C. § 717c(c) (1982); the Commission is authorized to hold hearings on the lawfulness of those rates, either upon complaint by certain parties or on its own initiative, *id.* § 717c(e); the hearings are to be conducted in accordance with certain procedural restrictions, *id.* § 717n; and the Commission may fix those rates at a reduced level based on the findings it makes in those hearings, *id.* § 717d. In addition, Congress granted the Commission the broad power "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of this chapter [regulating natural gas rates]." *Id.* § 717*o*. As stated in *Chevron*, this explicit delegation of power to an agency compels a court to give deference to the agency's conclusions even on "pure" questions of law within that domain. 467 U.S. at 843-44.[2]

We thus conclude that *Chevron* has implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation. *See, e.g., Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268-70 (1960) (upholding de novo review of an agency's interpretation of a contract). In *Texas Gas*, the Court upheld a de novo review standard where "the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of construction employed by the courts, and did not in any wise rely on matters within its special competence." *Id.* at 270. In *Chevron*, by contrast, the Court recognized that where Congress has made an explicit or

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[2] This court has previously relied on this extensive delegation of authority by Congress in reviewing the Commission's interpretation of a tariff, stating that "FERC's order, like all Commission orders under the Natural Gas Act, is to be accorded a presumption of validity. *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 . . . (1968)." Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1544 (D.C. Cir. 1985).

implicit grant of power to an agency over certain matters, that grant of power embodies congressional recognition of the agency's "special competence" to handle those matters, and compels deference from the courts in reviewing how that power is exercised.[3] *See also Jewett* v. *Commissioner*, 455 U.S. 305, 318 (1982) (canon of deference to agency's interpretation of its governing statute "is even more forceful" when applied to agency's interpretation of its own regulation).

Although we think *Chevron* principles alone compel this conclusion, there are other reasons for a court to defer to an agency's reading of a settlement agreement. One is the agency's greater expertise. As this court stated even before *Chevron*, "there is room, in review of administrative agencies, for some deference to their views even on matters of law like the meaning of contracts, as on the meaning of statutes, where the understanding of the documents involved is enhanced by technical knowledge of industry conditions and practices." *Columbia Gas Transmission Corp.* v. *FPC*, 530 F.2d 1056, 1059 (D.C. Cir. 1976); *see also Gulf States Utils. Co.* v. *FPC*, 518 F.2d 450, 457 (D.C. Cir. 1975) (deference is particularly appropriate where the question of interpretation is a technical one). Some courts have understood statements like this to imply that unless it is clear that the agency's interpretation rests on expert knowledge, no deference should be given. *See, e.g., Mid Louisiana Gas III*, 780 F.2d at

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[3] The only obvious difference between interpretation of a settlement agreement and interpretation of a statute is that the agency is construing the statements and intentions of private parties rather than those made by the Congress. Yet the holding in *Chevron* rests not on the identities of the individuals whose intentions are in question, but on the fact that the governing statute explicitly or implicitly embodied Congress' decision to delegate authority to an agency over particular matters, thus compelling deference from the courts in reviewing how the agency exercised its authority on those matters.

1243. We think that the better view, particularly in light of *Chevron*, is that deference should be given because the congressional grant of authority to the agency indicates that the agency's interpretation typically *will* be enhanced by technical knowledge. Construction of a settlement agreement will be influenced by the agency's expertise in the technical language of that field and by its greater knowledge of industry conditions and practices, including its more comprehensive experience with the kinds of disputes and negotiations that generally produce such an agreement. As this court has stated:

> Even assuming that the exercise we are here reviewing involves not policy-making but a search for the parties' contractual intent, that search nonetheless profits from familiarity with the field of enterprise to which the contract pertains. Whether interpretation of the present agreements raises an issue of law . . . or an issue of fact, . . . we would be foolish not to accord great weight to the judgment of the expert agency that deals with agreements of this sort on a daily basis.

Kansas Cities v. *FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983) (citations omitted).[4]

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[4] The contrary argument might be that interpretation of a settlement agreement often may be a *peculiarly* legal task, and that deference is inappropriate because courts are *more* expert than agencies at interpreting such agreements. But aside from the points mentioned in the text, the major problem with this argument, once again, is *Chevron*. The same argument about the greater relative expertise of courts had been made frequently with respect to issues of statutory construction, *see, e.g.*, Hardin v. Kentucky Utils. Co., 390 U.S. 1, 14 (1968) (Harlin, J., dissenting); NLRB v. Marcus Trucking Co., 286 F.2d 583, 591 (2d Cir. 1961) (Friendly, J.), but held no sway with the Court in *Chevron*. We can see no relevant difference on this point between interpretation of a statute and interpretation of a settlement order. *See supra* note 3. Indeed, the Supreme Court's decision in *Texas Gas* had been cited in this circuit more often in cases involving

A further reason, at least in this case, for this court to defer to the Commission's reading of this settlement agreement is that Congress required the Commission to take an active role in approving the agreement. Under the statute, the Commission is obliged to ensure that rates are not "unjust, unreasonable, unduly discriminatory, or preferential." 15 U.S.C. § 717d(a) (1982). In deciding to approve this settlement and enter it as an order, the Commission had to construe its provisions in light of the concessions each side had made. The Commission's view that NFGS failed to reserve any right to reprice its own gas production under the Act's ceiling prices for "first sale" gas may well have affected its determination that the specified rates were just and reasonable. *Cf. Swift & Co.* v. *Federal Maritime Comm'n*, 306 F.2d 277, 281 (D.C. Cir. 1962) (agency "must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval" where the agreement "is not simply a private contract between private parties" but "existed legally only because approved by the [agency]"). A rule of deference by the courts will not work any great hardship on the parties to an agreement, but it will ensure that the Commission is established as the primary adjudicator in this field, as Congress intended.

There may, of course, be circumstances in which deference would be inappropriate. If the agency's interpretation of a contract has vacillated, deference might give the agency license to act arbitrarily by making inconsistent decisions without justification. *See, e.g., Tennessee Gas Transmission Co.* v. *FERC*, 789 F.2d 61, 62-63 (D.C. Cir.

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interpretation of statutes, *see* Office of Consumers' Counsel v. FERC, 655 F.2d 1132, 1141 n.21 (D.C. Cir. 1980); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978); Lubrizol Corp. v. EPA, 562 F.2d 807, 816 n.23 (D.C. Cir. 1977), than in cases involving interpretation of contracts, *see* Lowey v. Watt, 684 F.2d 957, 965 (D.C. Cir. 1982), though all of these cases predate *Chevron*.

1986) (vacillation in agency rationale does not constitute reasoned decisionmaking); *cf. FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (consistency of an agency's interpertation of statute bears on the amount of deference given by courts). Or if the particular governing statute expresses Congress' intent that the courts should play a fully independent role in interpreting contracts in that field, the statute may indicate that no deference should be accorded to the agency's interpretation. *See, e.g., Local Union 1395, IBEW* v. *NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986) (no deference where labor statutes explicitly give courts an independent role in interpreting collective bargaining agreements). In addition, if the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract. In this case, however, the Commission itself was not a party to the contract, though the Commission's staff actively participated in negotiating the settlement agreement between NFGS and the other interested parties. The Commission and its staff are not a single entity for all purposes; there is an obvious difference between binding legal actions taken by the Commission, such as approval of a settlement order as "just and reasonable," and the everyday activities of its staff, such as assisting in the negotiations that helped fashion the settlement. In particular, the status of the Commission's staff as a "party" to the settlement negotiations does not make the Commission itself an interested party to the settlement contract.[5]

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[5] It was suggested at oral argument that private parties will be less inclined to negotiate settlements with the Commission staff if courts later pay deference to the Commission's interpretation of the settlement. That concern is answered in part by the fact we have noted, that the staff and the Commission do not constitute a monolith. Agencies not infrequently reject or modify their staffs' positions. To the degree there is any substance to the expressed fear, private parties

Our somewhat extensive discussion of the standard of review should not obscure our conclusion. We think that we are bound to give deference to the Commission's reading of the settlement agreement for Period II. But this is deference, not abdication. As in *Chevron*, if the intent of the parties on the particular issue is clearly expressed in the document, "that is the end of the matter." 467 U.S. at 842. We thus endorse the Fourth Circuit's view that a court need not accept "an agency interpretation that black means white. However, if the choice lies between dark grey and light grey, the conclusion of the agency, unmistakably possessed as it is of special expertise, in favor of one or the other will have great weight." *Consolidated Gas*, 745 F.2d at 291 (footnote omitted).

In this instance, we find that the Commission's interpretation of the settlement agreement for Period II was both a reasonable reading and, indeed, a correct one. The Commission held that NFGS could not recover a retroactive rate increase for this period because in the settlement agreement NFGS failed to reserve any right to make such a recovery. We agree. The settlement expressly stated that it resolved "all issues now pending before the Commission in the rate proceeding." Stipulation and Agreement of February 20, 1981, at 1, Appendix D to Brief of Petitioner at D-4. Those issues included all of the questions surrounding the proper valuation of NFGS's own gas production. As noted earlier, one of

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will simply have to be more cautious in agreeing to settlements. They should not tolerate ambiguities but, for example, must explicitly reserve rights they may wish to assert later. Doing so may cost them other concessions in the contract, but that merely means they must pay a price for removing ambiguities at the outset rather than reserving them for litigation later. Indeed, if judicial deference to the Commission forces greater clarity in settlement agreements, with less subsequent litigation, efficiency will be increased for private parties as well as for the regulatory system.

those questions was whether that gas would be valued on a cost-of-service basis or at some other rate; the parties agreed on cost-of-service valuation, and the Commission accepted that agreement when it entered its order approving the settlement. NFGS argues that it was bound to accept cost-of-service valuation of its own gas production under the Commission's regulations that were in effect at that time. This is not strictly correct, as we have pointed out, but it is true that those regulations were binding on NFGS insofar as at the time they prevented this gas from being valued as "first sale" gas. Nonetheless, that state of affairs did not prevent NFGS from reserving the right to seek adjustments if those regulations were later overturned by the courts. At the time this settlement agreement was negotiated and approved, the Act had been enacted and challenges to those regulations, as, for example, in the *Mid-Louisiana Gas* litigation, were already underway in the courts. Under these circumstances, it seems reasonable for the Commission to conclude that NFGS's complete failure to mention this issue constituted implicit acceptance of these rates as final and not subject to retroactive adjustment.[6]

The only real difficulty with this reading of the settlement is posed by a general disclaimer that it contains, which states that "no party to this proceeding shall be deemed to have waived any claim or right which it may

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[6] NFGS also suggests that the Commission had given an assurance that retroactive rate adjustments could be made. The language of that "assurance" states only that if the regulations were overturned, "this Commission could authorize the collection of revenues denied by this provision through surcharges." Regulations Implementing the Natural Gas Policy Act of 1978, 6 F.E.R.C. (CCH) ¶ 61,077, at 61,151 (Jan. 29, 1979). This statement, however, does not obligate the Commission to authorize retroactive adjustments, but merely observes that the Commission *could* authorize such adjustments if it considered them to be appropriate.

otherwise have with respect to any matters not provided for herein." Stipulation and Agre Appendix to Brief of Petitioner at D-21. This however, is insufficient to constitute an expre tion of a right to make retroactive adjustments rates. *See Mid-Louisiana Gas III*, 780 F.2d a Nor does it shake our view that the Commission a reasonable interpretation of the agreement wh found that NFGS had failed to reserve this issue e by indirection. For one thing, the matter of how value NFGS's own gas production *is* "expressly provide for" in the agreement. In addition, the disclaimer only preserves rights that NFGS "may otherwise have," but we have been unable to identify any other grounds for NFGS to claim such a right.

There is, however, a further and very important reason why the Commission was correct in concluding that NFGS had failed to reserve this right. The Commission's reading of the agreement is not only consistent with what the parties *purported* to do in the settlement, but it is strongly supported by what they *actually* did. On three separate occasions in this agreement, where NFGS wished to reserve the right to adjust its rates if specific contingencies occurred in the future, it explicitly reserved that right. The interest rate on refunds to NFGS's customers mandated in the agreement was made expressly contingent on the outcome of a case then pending in the Fifth Circuit Court of Appeals. Stipulation and Agreement at 6 n.1, Appendix to Brief of Petitioner at D-9 n.1. Also, if NFGS's income tax rates changed during the period covered by this settlement, its rates were to be adjusted accordingly. *Id.* at 12, Appendix at D-15. Finally, NFGS reserved the right to file appropriate adjustments in its rates if the Internal Revenue Service were to issue a ruling that might impair NFGS's ability to claim accelerated depreciation treatment on

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certain of its assets. *Id.* at 14-15, Appendix at D-17 to D-18. Each of these provisions demonstrates that NFGS knew how to reserve issues that had a bearing on the rates applicable to its own gas production, even if those reservations might cost them valuable benefits in the settlement negotiations. Together, they make it very difficult to read this agreement as reserving through silence the right to claim a retroactive adjustment on a prominent issue that was being fought out in the courts during the very period in which this agreement was reached. Such a reading would mean that silence and explicit reservation in the same document are to be given identical legal effect. *See also Consolidated Gas*, 745 F.2d at 289-90 (concluding on very similar facts that the explicit reservation of some cost issues in a settlement that did not mention the "first sale" issue implied that the latter issue was not reserved).[7]

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[7] Another relevant example of the underlying actions of the parties to a settlement, which the Fifth Circuit partly relied on in *Mid Louisiana Gas III* to find that a party did not waive its right to seek retroactive adjustments in its rates, is how much the issues resolved in the settlement agreement were worth relative to the value of the alleged concession. In that case, and similarly in the companion case, the court was unwilling to accept that a party would have waived its right to seek a retroactive adjustment by indirection when that concession was many times more valuable than the entire amount at stake in the agreement. *See Mid Louisiana Gas III*, 780 F.2d at 1245 (concession worth $9,000,000 as opposed to settlement agreement involving only a $124,000 increase in rates); Kentucky-West Virginia Gas Co. v. FERC, 780 F.2d 1231, 1236 (5th Cir. 1986) (concession worth $60,000,000 as opposed to settlement agreement involving only a $5,000,000 increase in rates). By contrast, the economics in this case are entirely credible: over nineteen months, the concession was worth about $8,000,000, *see* Brief of Petitioner at 6, as opposed to a settlement agreement that addressed NFGS's attempt to gain about a $28,000,000 increase in rates. *See* Stipulation and Agreement at 1, Appendix to Brief of Petitioner at D-4.

IV.

For all of the foregoing reasons, we conclude that the Commission correctly held that NFGS is not entitled to any retroactive adjustment in its rates for either Period I or Period II. The Commission's decision is therefore

Affirmed.

[26 FERC ¶61,105 at 61,251] National Fuel Gas Supply Corporation, Docket Nos. TA84-1-16-000 (PGA84-1) and GP84-17-000

Order Accepting For Filing and Suspending Tariff Sheet Subject to Refund and Conditions

(Issued January 31, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

[61,252] On December 30, 1983, National Fuel Gas Supply Corporation (National) filed a tariff sheet 1/ reflecting an overall purchased gas adjustment (PGA) decrease of approximately $30 million annually with a proposed effective date of February 1, 1984. The filing reflects: (1) a rate decrease of 21.46 cents per Mcf in the commodity portion of Rate Schedule I-1; (2) a decrease of 37 cents per Mcf in the demand portion of Rate Schedule R-Q; and (3) a decrease of 20.24 cents per Mcf

in the commodity portion of Rate Schedule RQ. The commodity adjustment consists of: (1) a 19.76 cent per Mcf decrease in the current purchase gas cost for Rate Schedule I-1 and a 18.54 cent per Mcf decrease for Rate Schedule RQ; (2) a decrease of 19.60 cents per Mcf in the purchase gas cost surcharge adjustment of both rate schedules resulting from the elimination of the currently effective surcharge of 5.56 cents per Mcf, which expires January 31, 1984, and the inclusion of a 14.04 cents per Mcf credit for amortizing the Account No. 191 balance as of November 30, 1983; and (3) a 17.90 cent per Mcf annual surcharge in both rate schedules to collect $29,210,235 resulting from the repricing of company-owned production to Natural Gas Policy Act (NGPA) levels for the period December 1, 1978 to May 31, 1982.

Public notice of the filing was issued on December 30, 1983 providing for protests, notices and motions to intervene to be filed by January 16, 1984. Timely filings were received from the Peoples Natural Gas Company and The Public Service Commission of the State of New York (New York). If answers in opposition to timely motions to intervene have not been filed within 15 days of the date of filing of the respective motions, the movants are made parties to this proceeding pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214(c)(1). Notices of intervention are granted pursuant to Rule 214(a).

Discussion of Filing

Company-Owned Production

The subject filing includes 4.7 million Mcf of gas from National's own production in the current adjustment priced

at NGPA rates for a total of approximately $15 million. National proposes a twelve-month surcharge adjustment of 17.90 cents per Mcf to recover costs associated with repricing company-owned production from a cost-of-service basis to NGPA levels for the period December 1, 1978 through May 31, 1982. The surcharge is proposed to be effective during the period February 1, 1984 through January 1, 1985.

Pursuant to a Commission order issued December 2, 1982, 2/ National was allowed to reprice its own pipeline production on an NGPA basis as of June 1, 1982 to implement the decision of the United States Court of Appeals for the Fifth Circuit in Mid-Louisiana Gas Company v. F.E.R.C. 3/ While National's filing in that docket was intended to reprice only that company-owned production beginning on June 1, 1982, it asserted that it reserved the

right to reprice retroactively all qualifying production from December 1, 1978, the effective date of the NGPA, to May 31, 1982. The Commission made no decision at the time as to what action it would take on any filing National might make to reprice its pipeline production for the earlier period.

National contends that the action of the Supreme Court in vacating Order Nos. 58 and 98 [FERC Statutes and Regulations ¶30,101, 30,177] mandates that pipelines price all of their company production up to the ceiling prices specified in the NGPA. Further, National states that Order No. 16 4/ changed the definition of "purchased gas cost" to include pipeline production, and gave pipelines the choice of recovering gas costs exclusively in general rate cases or exclusively in semi-annual PGA filings. National states that

it chose the PGA option, and therefore was barred from recovering any Mid-La amounts in a general rate case proceeding, unless exceptional circumstances were present.

Therefore, National requests a waiver of Part 273 of the Commission's regulations to permit this filing. National submits that good cause exists to waive these regulations as the Commission conditioned the earlier authorization for the post-June 1, 1982, period on inter alia, the final action of the United States Supreme Court in Mid-La. National states that it had no reason to believe filings were required of it as of the cut-off dates in Part 273 because of the Commission's regulations denying first-sale status to National's pipeline production prior to the Mid-La decision. Now that it is clear that pipeline production is eligible for NGPA pricing, National states

that a waiver of the filing deadline contained in Part 273 is appropriate.

The Commission denies National's request to collect retroactive amounts for any wells which have not qualified under Part 273 for NGPA prices. The request for waiver of Part 273 is assigned Docket No. GP84-17 and the merits of the request for waiver will be addressed in that forum. Interveners who are made parties to Docket No. TA84-1-16 shall be made parties to Docket No. GP84-17. No surcharge for the repricing of company-owned production for the period of December 1, 1978 to May 31, 1982 is permitted in this docket for **[61,253]** any wells that have not qualified for NGPA prices pursuant to Part 273. We shall condition acceptance of this filing on the filing of revised rates to be effective February 1, 1984, reflecting the removal of any costs from the proposed

filing which have not qualified for NGPA pricing.

We note that National's filing includes a surcharge proposal to amortize, over 12 months, costs associated with revaluing company-owned production from cost of service to NGPA levels retroactively to December 1, 1978, instead of National's normal 6-month surcharge period. We shall direct National to refile rates reflecting a 6-month amortization of these balances, in lieu of the 12-month proposal, consistent with recent action taken in Kentucky-West, the NGPA provides ceiling prices for National's own pipeline production such that the decision to reprice this gas is solely within the discretion of National. In light of this fact, we find no justification for a 12-month surcharge.

Pipeline Suppliers

National's filing tracks the rates of six pipeline suppliers, including Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation (Consolidated), Tennessee Gas Pipeline Company, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, and Valley Gas Transmission, Inc. Certain of the supplier rates as included in the filing have either been accepted by the Commission subject to downward revisions, or have not yet been accepted. In addition, Consolidated filed a further reduction to its rates on January 9, 1984, which is not reflected in the subject filing. Accordingly, the tariff filing will be accepted effective February 1, 1984, subject to downward revision to track any reduction in the pipeline supplier's rates being tracked.

Base Tariff Rates

The subject PGA filing is based on the base tariff rates as filed by National on December 30, 1983, in Docket No. RP82-105. The Commission has not taken action on that filing as yet. Consequently, the subject tariff sheet is accepted effective February 1, 1984, subject to any further orders in Docket No. RP83-105.

Affiliated Entities

The Commission is currently investigating the affiliated entities issue of NGPA section 601(b) (1)(E) in National's underlying PGA in Docket No. TA83-2-16. The current filing is made subject to any orders issued in Docket No. TA83-2-16 concerning affiliated entities.

Order Nos. 93 and 93-A

National's filing includes costs associated with producer payments made pursuant to Order Nos. 93 [FERC Statutes and

Regulations ¶30,172] and 93-A [15 FERC ¶61,075] in both its projected gas costs and in determining Btu's for purposes of establishing the price applicable to first sales of natural gas has been vacated by a recent court decision. 6/ Therefore, National is directed to file a reduced current PGA adjustment and Account No. 191 surcharge reflecting only those costs determined on a saturated measurement basis and eliminating all costs determined on an "as delivered" basis pursuant to Order Nos. 93 and 93-A.

Motion for Summary Judgment

New York filed a notice of intervention and a motion for summary judgment. New York states that National is seeking to obtain a retroactive collection of $18.6 million by repricing company-owned production during the period December 1, 1978 through May 31, 1982 at the full NGPA

maximum lawful prices. It contends that there are no facts material to the outcome of this issue which are in dispute and thus summary judgment is appropriate under Rule 217.

The basis of New York's claim is that National's own production has been priced by final Commission orders, on a cost-of-service basis throughout the period for which it now seeks retroactive recovery at the difference between the cost-of service unit rate and the NGPA maximum lawful prices. New York contends that National filed for and received final Commission approval to price its own production on a cost-of-service basis in two rate filings, Docket Nos. RP77-57 and RP80-97, which cover the period for which National now seeks retroactive repricing.

The question as to whether National is otherwise barred from revaluing its

production because of past Commission-approved settlement agreements or other final orders issued by the Commission shall be deferred and resolved in a future order.

[61,254] Based upon a review of this filing, the Commission finds that the proposed tariff sheet has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept National's proposed tariff filing and suspend its effectiveness for the period set forth below and subject it to the conditions set forth in this order.

In a number of suspension orders, 7/ the Commission has addressed the considerations underlying the Commission's policy regarding rate suspensions. For the reasons given there, we have concluded that

rate filings should generally be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards. It has been acknowledged, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. Such circumstances exist here where the rate change results in a rate reduction to National's customers and is filed pursuant to a Commission approved tracking provision. Accordingly, we believe that we should exercise our discretion to suspend the rates, but permit the rates to take effect February 1, 1984, subject to refund and subject to the conditions set forth in the body of this

order and in the ordering paragraphs below.

The Commission orders:

(A) National's tariff filing is accepted for filing and suspended, to become effective February 1, 1984, subject to refund and subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

(B) Acceptance of National's filing is conditioned on the following:

(1) National shall within 30 days file revised rates reflecting (a) the removal of costs from the proposed filing's projected gas costs or its surcharge adjustment for the repricing of company-owned production to NGPA levels for wells for which National has not received authorization under Part 273 of the Regulations under the NGPA; and (b) a surcharge to amortize the balance associated with re-

valued company-owned production over 6 months rather than 12 months;

(2) The issue of whether National should be granted waiver of Part 273, as discussed in the body of this order, is severed from this proceeding and will be resolved in a separate docket, which is hereby established as Docket No. GP84-17; Interveners who are parties in Docket No. TA84-1-16 shall be made parties in Docket No. GP84-17.

(3) Acceptance of National's filing is subject to all orders relative to implementing Mid-La;

(4) National shall file revised tariff sheets reflecting any downward modification based on any such modification in its pipeline supplier rates tracked herein;

(5) Acceptance of National's filing

is subject to all orders issued in Docket No. RP83-105;

(6) The outcome of National's underlying PGA proceedings in Docket No.1 TA83-2-16 concerning the affiliated entities limitation of NGPA section 601(b)(1)(E).

(7) National's filing, within 30 days of the date of this order, reflecting a reduced current PGA adjustment and Account No. 191 surcharge to be effective February 1, 1984 reflecting only those producer costs determined on a saturated measurement basis and eliminating all costs determined on an "as delivered" basis.

-- Footnotes --

1/ Forty-Fifth Revised Sheet No. 4, to FERC Tariff, Original Volume No. 1.

2/ 21 FERC ¶61,253.

3/ Since that order was issued the Fifth Circuit decision was affirmed by the Supreme Court. 664 F.2d 530 (5th Cir. 1981), aff'd sub nom. Public Service Com-

mission of the State of New York v. Mid-Louisiana Gas Co., 103 S.Ct. 3024 (June 28, 1983) (Mid-La) (vacated Order Nos. 58 and 98).

4/ FERC Statutes and Regulations ¶30.023 (November 30, 1978).

5/ 25 FERC ¶61,158 (1983).

6/ Interstate Natural Gas Association v. F.E.R.C., 716 F.2d 1 (D.C. Cir. 1983). See also Interpretative Rule issued January 19, 1984, in Docket No. RM80-33-001; Notice of Inquiry, issued January 19, 1984 [FERC Statutes and Regulations ¶30,532, ¶35,514].

7/ E.g., Valley Gas Transmission, Inc., 12 FERC ¶61,197 (1980) (one-day suspension); Great Lakes Gas Transmission Co., 12 FERC ¶61,293 (1980) (five month suspension).

[27 FERC ¶61,111 at 61,209] National Fuel Gas Supply Corporation, Docket Nos. TA84-1-16-001 (PGA84-1) and GP84-17-001

Order Denying Rehearing and Modifying Prior Order

(Issued April 20, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A.G. Sousa and Oliver G. Richard III.

On March 1, 1984, National Fuel Gas Supply Corporation (National Fuel) filed a

request for rehearing of the Commission's order issued on January 31, 1984. 1/ On April 2, 1984, the Commission issued an order granting rehearing for the limited purpose of further consideration of National Fuel's request for rehearing. Further, on February 24, 1984, the Commission issued an order denying a motion for stay of part of the January 31, 1984 order. 2/ We now address the merits of the company's request.

National Fuel alleges that rehearing should be granted to: (1) authorize it to collect Natural Gas Policy Act (NGPA) prices, subject to refund, for its company-owned production from December 1, 1978 through May 31, 1982, 3/ which failed to meet the time-of-filing requirements of Part 273 of the Commission's Regulations 4/; (2) permit it to amortize costs associated with pipeline production allowed

for the period June 1, 1982 through October 31, 1982, by a previous Commission order, 5/ through a surcharge over a 12-month period instead of its normal 6-month amortization period; and (3) delete a requirement that it eliminate costs associated with Order Nos. 93 [15 FERC ¶61,075] from its rates in this docket.

Discussion

Company-Owned Production

National Fuel argues that the Commission violated a duty to let it collect NGPA prices on a parity with other first sellers and that the Commission has an obligation to let it collect NGPA prices without delay. National Fuel, among other things, urges the Commission to summarily reach this result without the necessity of determining whether a waiver of Part 273 6/ is necessary or, in the alternative, justified. Further, National Fuel argues

that it should be permitted to use a 12-month period rather than a 6-month period to amortize these pipeline production costs.

Upon review of our January 31, 1984 order, we note that we have not addressed a fundamental issue concerning National Fuel's proposal to reprice its own production from a cost-of-service to an NGPA basis for the period from November 1, 1978 through May 31, 1982. This issue is whether or not National Fuel preserved its right to reprice its pipeline production from a cost-of-service to an NGPA basis for that period. 7/ Based upon our review of that past period, we conclude that National Fuel has not preserved its right to reprice its production to an NGPA basis for that period. 8/ Accordingly, we need not reach the issues of whether waiver of Part 273 of the **[61,210]** Commission's reg-

ulations is appropriate or whether a 12-month period instead of a 6-month period for amortizing these costs is required, because these issues are moot in light of our finding that National Fuel has not preserved its right to collect these costs from its customers.

There are two periods which are relevant to resolution of this issue: December 1, 1978 through October 31, 1980 (Docket Nos. RP76-96, RP77-14 and RP77-57) (Period I) and November 1, 1980 through May 31, 1982 (Docket No. RP80-95) (Period II). We will discuss each period separately.

Period I

The issue of the pricing of National Fuel's pipeline production was fully litigated for this period. Docket Nos. RP76-96, et al., involved two consecutive gen-

eral rate proceedings under Section 4 of the Natural Gas Act and a related rate filing covering a locked-in period from November 1, 1976 through October 31, 1980. 9/ The parties reached a settlement of all but four reserved issues, which were set for hearing. One of those issues set for hearing was the proper pricing of all of National Fuel's pipeline production. 10/

At the hearing, which was held during April of 1978, National Fuel proposed to price all of its pipeline production on a cost-of-service basis. At the time, the Commission's rules 11/ provided for the pricing of old production 12/ on a cost-of-service basis and new production 13/ on a producer parity basis. No party challenged National Fuel's proposal to price its old production on a cost-of-service basis. However, the Commission's staff

proposed area or nationwide (producer parity) rate treatment for the new production because, it was argued, National Fuel had not demonstrated the requisite "special circumstances" to support cost-of-service pricing for new pipeline production. 14/

The presiding judge upheld National Fuel's request for cost-of-service treatment for all of its pipeline production. With respect to National Fuel's new production, he noted that the cost-of-service approach would result in costs below the applicable producer parity rates for the period in question and that since the producer parity rates were rate ceilings, he allowed National Fuel to continue to price its new pipeline production on a cost-of-service basis. 15/

On exceptions, National Fuel continued to support cost-of-service pricing for all of its pipeline production. On August

6, 1979, the Commission issued Opinion No. 58 16/ which approved the partial settlement agreement discussed earlier and affirmed the initial decision in all respects, including its finding that, as proposed by National Fuel, all of National Fuel's pipeline production would be priced on a cost-of-service basis in National Fuel's general Section 4 rates which were established in the proceeding.

Opinion No. 58 is now final and no longer subject to rehearing or judicial review. National Fuel is now attempting to modify rates established for a past period which are final and no longer subject to rehearing or judicial review. National Fuel made no effort in Docket No. RP76-96, et al., or anywhere else, to preserve its rights to reprice its production for the period from December 1, 1978 (the date the Natural Gas Policy Act became

effective), through October 31, 1980, in the event that a reviewing Court would overturn the Commission's rules which were issued after the NGPA became effective 17/ governing rate treatment for pipeline production. Costs associated with all of National Fuel's pipeline production were at issue and were resolved in National Fuel's general Section 4 rate proceeding in Docket No. RP76-96, et al. Thus, these costs were a component of National Fuel's Section 4 rates approved in that proceeding. National Fuel has presented no legal or other basis to now, in effect, raise National Fuel's rates for the period December 1, 1978 through October 31, 1980, to reflect its proposal to reprice its pipeline production from a cost-of-service to a NGPA basis for that period.

Period II

This period begins on November 1, 1980, when the rates in National Fuel's general Section 4 rate filing in Docket No. RP80-95 became effective subject to refund. That docket was superseded by the rates in the general Section 4 rate filing in Docket No. RP82-13 which became effective, subject to refund, on June 1, 1982. Thus, Docket No. RP80-95 covers the period from November 1, 1980 through May 31, 1982. 18/ Final rates for this period were established in a settlement agreement certified to the Commission on March 11, 1981, by the presiding administrative law judge and approved by Commission letter order issued April 21, 1981, in Docket No. RP80-95. 19/ National Fuel included costs in the settlement agreement reflecting cost-of-service pricing for all of its pipeline production. Thus, these costs made up part of the general Section 4 rate

approved by the settlement agreement in Docket No. RP80-95. No language was included in the settlement agreement in Docket No. RP80-95. No language was included in the settlement agreement reserving National Fuel's right to **[61,211]** impose a surcharge at a later date to, in effect, raise the rates which the Commission had approved for National Fuel in Docket No. RP80-95, et al., for Period II if a reviewing court should reverse or modify the Commission's pipeline production regulations under the NGPA. Therefore, the question to be resolved is whether or not the settlement agreement acts as a bar to National Fuel's request for a surcharge to reprice its pipeline production for the period from November 1, 1980 through May 31, 1982.

The courts have characterized a settlement agreement variously as a "private

contract", 20/ as an "administrative contract", 21/ or simply as a "contract". 22/ In all cases, however, the rules of construction applicable to contracts have been held to apply to settlement agreements. 23/ In addition, the courts have looked to the setting and the circumstances leading to settlement. 24/ The circumstances considered in construing a settlement agreement include: (1) the fact that the company involved was litigating a Commission policy or order which cold affect the case being settled; (2) other obligations outstanding at the time of the settlement; (3) and the statutory setting. 25/ It has been held that what is not specifically stated in the settlement agreement cannot thereafter be read into it. 26/

This is particularly true for those general Section 4 rate settlements such as

the instant settlement agreement, entered into after the enactment of the NGPA. The rules issued by the Commission on December 1, 1978, governing all NGPA matters (including treatment of pipeline production) were interim in nature. A final Commission rule on rehearing on pipeline production was not issued until October 3, 1980. Throughout the Commission's consideration of the pipeline production issue in Docket No. RM80-7 (Order Nos. 58 and 102) and Docket No RM80-6 (Order Nos. 98 and 102), pipelines argued that all pipeline production should be treated as a first sale under the NGPA and receive first sale rate treatment under the NGPA. Thus for this settlement, it would be difficult for a pipeline to argue that it was not in any way foreseeable that first sale treatment for all pipeline production was a possible, ultimate interpretation of the NGPA.

The binding nature of administrative settlement agreements has been discussed in a number of cases. In Pennsylvania Gas & Water Co. v. F.P.C., 46 F.2d 1242, 1246 (D.C. Cir. 1972), the Court stated:

> "It is well to note at he outset that 'settlement' carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in court. As we shall see later, in agency proceedings settlements are frequently suggested by some, but not necessarily all, of the parties; if on examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all parties, even though not all are in accord as to the result. This is in effect a 'summary judgment' granted on 'motion' by the litigants where there is no issue of fact. (footnote omitted.)"

In finding that a settlement need not be unanimous to be binding on the parties to a litigated proceeding, the D.C. Circuit Court relied on the decision of Cit-

ies of Lexington, et al., Kentucky v. F.P.C., 295 F.2d 109, 121 (4th Cir. 1961), where the court stated:

> "There is nothing in the Administrative Procedure Act which expressly requires unanimous consent of all participating parties to an agreement of settlement; and to read such a contention into the statute in view of the countless state agencies, municipalities, and consumers who may be interested in an administrative proceeding would effectually destroy the settlement provision."

In addition to binding the parties to a litigated proceeding, a settlement once approved, also binds the Commission. 27/ In accepting a settlement, the Commission makes a finding that the settlement is compatible with the public interest 28/ and it is therefore precluded from reversing this finding absent an order after an investigation under Section 5 of the NGA.

Settlements serve important policy considerations. They "eliminate the need

for often costly and lengthy formal hearings in those cases where the parties are able to reach result of their own" 29/ and their importance is recognized in the legislative history of Section 554(c) of the Administrative Procedure Act (5 U.S.C. §554(c)). 30/ That section provides:

> (c) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title. [Emphasis added.]

If parties to a settlement could simply opt out of it whenever circumstances changed in **[61,212]** their favor, the whole purpose of encouraging settlements may be frustrated. Settlements provide the Commission with an essential tool for resolv-

ing many cases without the need for a fully litigated proceeding. Thus, in reviewing the effect to be given to settlement agreements for the pipeline production issue, the Commission should consider the possible effects on the willingness of parties in future proceedings to enter into settlement agreements.

In determining whether or not a settlement agreement can be modified, the courts have looked not solely to the private law of contract, but also to the public interest standard inherent in all regulatory analysis. This standard, as developed in the Mobile-Sierra 31/ line of cases, reflects to some degree the dual nature of public utilities. It upholds the right of utilities to contract privately and does not allow the regulating agency to abrogate such contract even though it would have found the contract

price to be less than just and reasonable. But in some instances, the public interest will permit the agency to modify the contract.

The Mobile-Sierra doctrine essentially provides that the NGA does not abrogate private contractual arrangements but simply protects the public interest through the statutory filing requirements and the Commission's authority to review contractually authorized rate increases and to modify them if found unlawful. Thus, in United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332 (1956), the Supreme Court held that a natural gas company could not, without the consent of the distributing company, change the rate specified in the contract between the two simply by filing a new rate schedule with the Commission. The Court contrasted the NGA, which expressly recognizes that rates

to particular customers may be set initially by individual contracts filed with the Commission, with the Interstate Commerce Act, which precludes private rate agreements by its requirement that the rates to all shippers be uniform. The Court concluded that the NGA provided no right to unilaterally change a contract price.

After a careful review of National Fuel's settlement agreement in the context of the principles discussed above, and in light of our analysis of the provisions of the settlement agreement earlier in this order, we find that National Fuel has no authority to reprice its pipeline production from a cost-of-service basis to an NGPA basis for the period from November 1, 1980 through May 31, 1982.

In light of the above discussion, we shall require National Fuel to file re-

vised tariff sheets reflecting elimination of the costs associated with its proposal to reprice its pipeline production for the period from December 1, 1978 through May 31, 1982, and make any refunds, with interest, that may be necessary. In light of this action, that portion of National Fuel's request for rehearing on this issue shall be denied. Since the issue of waiver of Part 273 of the regulations is now moot, we shall terminate the proceedings in Docket No. GP84-17.

Order Nos. 93 and 93-A

National Fuel argues that the Commission lacks authority to require National to refund payments made in compliance with Order Nos. 93 and 93-A. The company requests rehearing the Commission's requirement that National Fuel's filing must reflect a reduced current PGA adjustment and Account No. 191 surcharge to reflect only

those producer costs determined on a saturated measurement basis, thus eliminating all costs determined on an "as delivered" basis in light of court action vacating Order Nos. 93 and 93-A. 32/

National Fuel's argument that it should not be required to refund monies paid to producers for gas measured on a "dry" or "as delivered" basis until the producers have made refunds to National misconstrues the effect of the Commission's order. That order does not require that National make any refunds. As indicated above, it simply requires that the rates, including the Account No. 191 surcharge, in National Fuel's filing shall not reflect producer costs for production measured on an "as delivered" or "dry" basis and that National Fuel shall pass through to its customers only those producer costs determined on a saturated mea-

surement basis. No refunds are required and nothing in the order precludes National Fuel from asserting any rights it has to recover any overcollections that producers have received from the sale of gas to National Fuel on a "dry" or "as delivered" basis. Accordingly, National Fuel's request for rehearing shall be denied. 33/ The date established for filing revised tariff sheets to remove these costs shall be modified, as discussed below.

The Commission order:

(A) National Fuel's request for rehearing of the Commission's January 31, 1984 order is denied and our January 31, 1984 order is modified as discussed in the body of this order and the Order Paragraphs thereof.

[61,213] (B) National Fuel shall file, within 45 days of the date of this

order, revised tariff sheets, and shall make refunds, with interest, to reflect removal from National Fuel's rates as of February 1, 1984, of costs associated with repricing its pipeline production for the period from December 1, 1978 through May 31, 1982, and removal of Order Nos. 93 and 93-A costs contained in its December 30, 1983 filing.

(C) Within 30 days of the date refunds, if any, are made, National Fuel shall file with this Commission a refund report supporting its refund amounts.

(D) The proceedings in Docket No. GP84-17 are terminated.

-- Footnotes --

1/ 26 FERC §61,105 (1984).

2/ 26 FERC §61,238 (1984).

3/ The proposal was triggered by the fact that the Commission's pipeline production pricing rules were reversed by the reviewing courts. Mid-Louisiana v. F.E.R.C., 664 F.2d 530 (Former 5th cir.

1981), mandate issued and rehearing denied March 2, 1982, affirmed in part and vacated and remanded in part sub. nom., Public Service Commission of the State of New York, et al. v. Mid-Louisiana Gas Co., et al., 51 U.S.L.W. 5030 (1983).

4/ 18 C.F.R. Part 273.

5/ 21 FERC ¶61,253 (1982).

6/ 18 C.F.R. Part 273.

7/ The Public Service Commission of the State of New York filed a motion for summary judgment in this docket arguing that National Fuel had not reserved its right to reprice this production for the period in question.

8/ See also: El Paso Natural Gas Company, 20 FERC ¶61,443 (1982), reh. denied, 21 FERC ¶61,219 (1982); Mid-Louisiana Gas Company, 21 FERC ¶61,072 (1982), reh. denied, 22 FERC ¶61,326 (1983); Consolidated Gas Supply Corporation, 22 FERC ¶61,120 (1983), reh. denied, 23 FERC ¶61,018 (1983); Kentucky West Virginia Gas Company, 21 FERC ¶61,251 (1982), reh. denied, 22 FERC ¶61,119 (1983).

9/ See Administrative Law Judge's Initial Decision for a more detailed procedural history. National Fuel Gas Supply Corporation, 5 FERC ¶63,018 at p. 65,139 (1978).

10/ The settlement was approved in the same order which affirmed the initial decision rendered by the presiding admini-

strative law judge. National Fuel Gas Supply Corporation, 8 FERC ¶61,135 (1979).

11/ 18 C.F.R. §2.66 (1978).

12/ Wells drilled prior to January 1, 1973, on leases acquired prior to October 8, 1969. This production was entitled to cost-of-service treatment.

13/ Wells drilled on or after January 1, 1973, on leases acquired prior to October 8, 1969, and all gas produced from leases acquired after October 7, 1969. This production was entitled to area or nationwide (producer parity) rate treatment.

14/ 18 C.F.R. §2,66 (1978).

15/ 8 FERC ¶61,135 (1979).

16/ 5 FERC ¶63,018 at pp. 65,148-49 (1978).

17/ From the time the interim rules under the NGPA were issued on December 1, 1978 (FERC Statutes & Regulations, Regulations Preambles 1977-1981 ¶30,026 at p. 30,144), several pipelines urged the Commission to allow NGPA pricing for all pipeline production. During the period between December 1, 1978 through the issuance of Order No. 98, the Commission continued, over the protests of some pipelines, to price old production on a cost-of-service basis and new production on an area, nationwide or NGPA rate basis. See also: Order No. 58, Final Rule Governing The Maximum Law Price for Pipeline, Distributor Or Affiliated Production, Docket

No. RM80-7, issued November 14, 1979, FERC Statutes & Regulations, Regulation Preambles 1977-1981 ¶30,101; Order No. 98, Pricing of Pipeline Production Under The Natural Gas Act, Docket No. RM80-6, issued August 4, 1980, FERC Statutes & Regulations, Regulations Preambles 1977-1981 ¶30,177; rehearing of Order Nos. 58 and 98 denied, Order No. 102, Natural Gas Pricing of Pipeline And Affiliate Production Under The Natural Gas Act, Docket Nos RM80-7 and RM80-6, issued October 3, 1980, FERC Statutes and Regulations, Regulations Preambles 1977-1981 ¶30,194. Basically, the Commission, in general, continued to price old production on a cost-of-service basis and new production on a producer parity (now NGPA) basis. But see footnote 3 above.

18/ The Commission has already determined that National Fuel preserved its right to reprice its pipeline production to an NGPA basis as of June 1, 1982, subject to several conditions. National Fuel Gas Supply Corporation, 21 FERC ¶61,253 (1982).

19/ National Fuel Gas Supply Corporation, 15 FERC ¶61,058 (1981). The settlement agreement also resolved three of National Fuel's PGA dockets.

20/ Texas Eastern Transmission Corporation v. F.P.C., 306 F.2d 345, 347 (5th Cir. 1962), cert. denied, Manufacturers Light and Heat Co. v. Texas Eastern Transmission Corporation, 375 U.S. 941 (1963).

21/ Texas Gas Transmission Corpora-

tion v. F.P.C., 441 F.2d 1392, 1395 (6th Cir. 1971).

22/ Mobil Oil Corporation v. F.P.C., 570 F.2d 1021, 1025 (D.C. Cir. 1978).

23/ The Commission has also taken the view that the applicable principles are those of contract law. See "Order Remanding Proceeding," Independent Oil & Gas Association of West Virginia, Docket No. RI74-188-003, et al., issued March 29, 1982 [18 FERC ¶61,289].

24/ Texas Gas Transmission Corporation v. F.P.C., 414 F.2d 1392; Mobil Oil Corporation v. F.P.C., 306 F.2d 345.

25/ Ibid.

[61,214] 26/ Texas Eastern Transmission Corporation v. F.P.C., 306 F.2d at 348. See also Corbin on Contracts §564 (1960).

27/ Texas Gas Transmission Corporation v. F.P.C., 414 F.2d 1392; Chicago v. F.P.C., F.2d 629 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968); Continental Oil Co. v. F.P.C., 373 F.2d 96 (10th Cir. 1967).

28/ Pennsylvania Gas & Water Company v. F.P.C., 463 F.2d at 1247.

29/ Ibid.

30/ Senate Judiciary Committee, Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). The Senate Judiciary

Committee in considering the predecessor of Section 554(c) stated:

> Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the Administrative process . . . .

S. Doc. No. 248, supra, at 24.

31/ United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332 (1956); F.P.C. v. Sierra Pacific Power Company, 350 U.S. 348 (1956).

32/ Interstate Natural Gas Association of America v. F.E.R.C., 716 F.2d 1 (1983), cert. denied sub nom., Exxon, Inc. v. Interstate Natural Gas Association of America, No. 83-1173, ___ U.S. ___ (March 19, 1984).

33/ See also: National Fuel Gas Supply Corporation, 26 FERC ¶61,238 (1984).

[28 FERC ¶61,102 at 61,022] National Fuel Gas Supply Corporation, Docket Nos. TA84-1-16-003 (PGA84-1) and GP84-17-002

Order Denying Rehearing and Reconsideration

(Issued July 5, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A.G. Sousa and Oliver G. Richard III.

On May 18, 1984, National Fuel Gas Supply Corporation (National Fuel) filed a request for rehearing and motion for reconsideration in response to an order issued on April 20, 1984. 1/ Among other things, that order denied rehearing of a January 31, 1984 Commission order that denied authorization for National Fuel to collect ceiling prices under the Natural Gas Policy Act of 1978 (NGPA) for its company-owned production from December 1, 1978 through May 31, 1982. 2/

Background

On January 31, 1984, in response to a purchased gas adjustment (PGA) filing by National Fuel on December 30, 1983, the Commission issued an order accepting for filing and suspending National Fuel's tar-

8iff sheets, subject to refund. 3/ The order denied National Fuel's request to collect NGPA prices for its company-owned production for gas from wells for which National Fuel had failed to meet the time-of-filing requirements of part 273 of the Commission's regulations. 4/ Among other things, the January 31, 1984 order also deferred action on National Fuel's request for waiver of part 273 pending a separate resolution of the waiver issue in Docket No. GP84-17-000 which was initiated by the January 31 order.

On March 1, 1984, National Fuel filed a request for rehearing of the Commission's order of January 31, 1984. On April 2, 1984, the Commission issued an order granting rehearing for the limited purpose of further consideration of National Fuel's request. Further, on February 24, 1984, the Commission issued an

order denying a motion for stay of part of the January 31, 1984 order. 5/

On April 20, 1984, the Commission issued an order denying rehearing and modifying the order issued on January 31, 1984. In that April 20, 1984 order, the Commission noted that the issue concerning National Fuel's proposal to reprice its company-owned production to an NGPA basis for the period from November 1, 1978 through May 31, 1982, involved two relevant periods: (1) December 1, 1978 through October 31, 1980 (Docket Nos. RP76-96, RP77-14 and RP77-57) (Period I); and (2) November 1, 1980 through May 31, 1982 (Docket No. RP80-95) (Period II). For reasons discussed below, the Commission found that National Fuel had failed to preserve any right to reprice its pipeline production for both Period I and Period II.

In regard to Period I, the Commission determined that the pricing of National Fuel's pipeline production from December 1, 1978 **[61,023]** through October 31, 1980, was fully litigated and decided. The Commission based its conclusion on the fact that Opinion No. 58 [8 FERC ¶61,135], which is final and no longer subject to rehearing or judicial review, approved a partial settlement and affirmed an initial decision which included a finding, as proposed by National Fuel, that all of the company's pipeline production should be priced on a cost-of-service basis. 6/ The Commission also concluded in the April 20 order that National Fuel had made no effort in Docket Nos. RP76-96, et al., which covered Period I, to preserve any right to reprice its company-owned production if a reviewing court should reverse or modify

the Commission's rules disallowing NGPA pricing for pipeline production. 7/

In regard to Period II (November 1, 1980 through May 31, 1982), the April 20, 1984 order noted that Docket No. RP80-95 covered a period in which final rates were established in a settlement agreement approved by Commission letter order issued on April 21, 1981. 8/ The Commission found that the settlement agreement reflected cost-of-service pricing for all of National Fuel's pipeline production and included no language reserving National Fuel's right to impose a surcharge at a later date to, in effect, raise the rates approved in that docket if a reviewing court should reverse or modify the Commission's pipeline production regulations. After reviewing the settlement agreement in the context of rules of construction applicable to contracts and in terms of

the public interest standards inherent in regulator analysis, the order found that National Fuel had no authority to reprice its pipeline production for the period from November 1, 1980 through May 31, 1982.

Having found that National Fuel had not preserved a right to reprice its pipeline production for the period December 1, 1978 through May 31, 1982, for reasons discussed abcve, the April 20, 1984 order denied National Fuel's request for rehearing on that issue. The order also terminated the proceedings that we initiated in Docket No. GP84-17-000 to resolve National Fuel's request for waiver of part 273 and of whether to permit amortization of costs associated with pipeline production over 12 months instead of National Fuel's normal 6-month surcharge period were moot.

National Fuel's Present Request For Rehearing And For Reconsideration

National Fuel claims that the Commission should not have concluded that it failed to preserve a right to collect NGPA prices for its pipeline production because it claims that it did not become aware of its right to do so until the Fifth Circuit's order reversed the Commission's rules on pricing pipeline production. It claims that it simply acquiesced in regard to the presumed validity of the Commission's regulations.

We are not persuaded that National Fuel was unaware of the pricing controversy prior to the court reversal of our pipeline production pricing rules. From the time that the interim rules under the NGPA were issued on December 1, 1978, a number of pipelines urged the Commission to allow NGPA pricing for all pipeline

production. 9/ The interim rules did not, however, permit the pipelines to collect NGPA pricing for pipeline production. The pipelines pursued this pricing issue through court litigation and won reversal of the pertinent pricing rules. National Fuel should have known, from the time the interim rules were issued, of the pricing issue related to pipeline production and the potential for reversal of the Commission rules. Accordingly, we reject National Fuel's argument that it was unaware of a need to preserve its right to reprice its company-owned production.

National Fuel's next argument is that the Commission has not shown that National Fuel expressly intended to waive valuable rights. In support of this proposition, National Fuel cites cases such as (a) a criminal case involving a Sixth Amendment right to counsel where a defendant was

tried, convicted, and sentenced without assistance of counsel and without having waived a right to counsel; 10/ (b) a case involving denial of conscientious objector status in which the case was decided on grounds other than whether the petitioner had waived his right to file; 11/ and (c) a case in which the court held that waiver of a contract right had not occurred where the right was expressed in a contract and there was no unreasonable delay in asserting that right. 12/

The cases cited by National Fuel are inapposite. What is relevant to the issue of waiver and preservation of rights is that the record demonstrates, as we have shown in the April 20 order, that National Fuel expressly agreed to reprice its pipeline production at cost-of-service levels for Period I. In Period II, National Fuel again proposed to price all of its pipe-

line production on a cost-of-service basis. There is no contrary indication in the settlement agreement covering that period. As we noted above, National Fuel agreed to such pricing methodology after the company was placed on notice that the pricing of pipeline production was in controversy. Yet during **[61,024]** litigation and settlement negotiations for the time periods at issue, National Fuel clearly failed to preserve whatever right it had to reprice its pipeline production. National Fuel made no effort to preserve a right to reprice pipeline production for the period from November 1, 1978 through October 31, 1980 for which it requested and received cost-of-service treatment in a litigated case; nor did it do so for the period from November 1, 1980 through May 31, 1982, for which it entered into a settlement agreement in which it reflected

cost-of-service treatment for all of its pipeline production. 13/ We therefore reject National Fuel's argument that it did not indicate an "expressed intent" to waive repricing rights.

National Fuel next asserts that it is entitled to NGPA pricing for the periods in question because at that time it had a PGA clause in its filed tariff in which it elected to track all changes in purchased gas costs through its PGA clause pursuant to Order No. 16. 14/ It contends that the effect of the NGPA, as finally decided by the United States Supreme Court, was to permit pricing of company-owned production to be treated as purchased gas costs and that automatically entitles it to NGPA pricing for company-owned production.

We disagree. While this statement is true in general, it does not take account of the facts of this case which are that

the pricing of pipeline production was an issue in National Fuel's general section 4 rate cases for Periods I and II. The cost-of-service amounts were costs at issue in those section 4 rate cases. National Fuel's general section 4 rates for those periods are now final, having been approved by final and non-appealable Commission orders. Those orders approved general section 4 rates based, in part, on cost-of-service pricing for all of National Fuel's pipeline production. Thus, the fact that National Fuel chose to use a PGA clause to track its costs of purchased gas is not relevant because the costs of pipeline production priced on a cost-of-service basis have always been collected through general section 4 rate cases, not PGA clause filings.

National Fuel also argues that it reserved the right to reprice its company-

owned production from December 1, 1978 to June 1, 1982, because it allegedly reserved such right by inserting a statement to that effect in letters accompanying its PGA filings on April 30, 1982, and July 1, 1983. We do not find this persuasive because these statements were made after National Fuel waived its rights for the periods in question. 15/ Moreover, as noted in our February 4, 1983 order in Kentucky-West Virginia Gas Co., 16/ a right to reprice company-owned production is not preserved by simply inserting such language in a letter included as part of a PGA filing.

As a final point, National Fuel argues that the Commission's order of April 20, 1984 suggests that the company is barred from repricing its company-owned production for the period November 1, 1980 through May 31, 1982 because that would

violate the filed-rate doctrine or constitute retroactive ratemaking. National Fuel argues that the repricing it proposes would not violate the filed-rate doctrine or constitute retroactive ratemaking because the pricing adjustments is proposes are pursuant to its PGA clause and are not changes in its filed rates.

We find those arguments irrelevant as it appears that National Fuel misread our April 20 order. It is unnecessary to explore ramifications of the filed-rate doctrine or the issue of retroactive ratemaking. It simply finds, for reasons discussed therein and in this order, that National Fuel, among other things, was required by the orders (which re now final and no longer subject to judicial review) covering Periods I and II to price its pipeline production on a cost-of-service basis.

In accordance with the discussion above, we find that National Fuel has failed to provide any basis for reversing our April 20, 1984 order. National Fuel's request for rehearing shall be denied. Accordingly, we shall also deny National Fuel's motion for reconsideration of the April 20, 1984 order to the extent that it did not address National Fuel's prior arguments on whether waiver of part 273 of the Commission's regulations is appropriate or whether a 12-month period is needed, instead of a 6-month period, for amortizing costs associated with repricing company-owned production for the periods at issue.

The Commission orders:

(A) National Fuel's request for rehearing of the Commission's April 20, 1984 order in this proceeding is denied.

(b) National Fuel's motion for reconsideration is denied.

-- Footnotes --

1/ 27 FERC ¶61,111 (1984).

2/ 26 FERC ¶61,105 (1984).

3/ Id.

[61,025] 4/ 18 C.F.R. Part 273.

5/ 26 FERC ¶61,238 (1984).

6/ 5 FERC ¶63,018 at pp. 65,148-49 (1978).

7/ [Regs. Preambles 1977-1981] FERC Statutes and Regulations ¶30,024 at p. 30,144.

8/ 15 FERC ¶61,058 (1981).

9/ See 27 FERC ¶61,111 at p. 61,213 n. 17 (1984).

10/ Johnson v. Zerbst, 304 U.S. 458 (1938).

11/ United States v. Stout, 415 F.2d 1190 (4th Cir. 1969).

12/ Southern Materials Co. v. Bryan Rock & Sand Co., 308 F.2d 414 (4th Cir. 1962).

13/ See 27 FERC ¶61,111 at pp. 61,201-11 (1984). In that order we noted that we had previously determined that

National Fuel, subject to NGPA requirements could reprice its pipeline production as of June 1, 1982.

14/ Regs. Preambles 1977-1981, FERC Statutes and Regulations ¶30,023 (1978).

15/ See 27 FERC ¶61,111 at pp. 61,210-11 (1984).

16/ 22 FERC ¶61,119 (1983).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1246

September Term, 1986
United States Court of Appeals for The District of Columbia Circuit

FILED FEB 20, 1987

GEORGE A. FISHER
CLERK

National Fuel Gas Supply Corporation,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Public Service Commission of the State of New York,
Pennsylvania Public Utility Commission,
Intervenors

No. 84-1285

National Fuel Gas Supply Corporation,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Pennsylvania Public Utility Commission,
Intervenor

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: **EDWARDS**, **BORK** and **SILBERMAN**, Circuit Judges.

J U D G M E N T

These causes came on to be heard on the petitions for review of orders of the Federal Energy Regulatory Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Energy Regulatory Commission under review herein are hereby affirmed, in accordance with

the Opinion for the Court filed herein this date.

Per Curiam
For The Court

George A. Fisher
Clerk

Date: February 20, 1987

Opinion for the Court filed by Circuit Judge Bork

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 84-1246 **September Term, 1986**

National Fuel Gas Supply Corporation

v.

Federal Energy Regulatory Commission

And Consolidated Case No. 84-1285

BEFORE: **EDWARDS, BORK** and **SILBERMAN**, Circuit Judges

O R D E R

Upon consideration of petitioner's Motion for Waiver of Local Rules 8 and 14 and of petitioner's Motion for Leave to File Substitute Petition Out of Time, such motion containing a request to withdraw the Motion for Waiver, it is

ORDERED, by the Court, that the request to withdraw the Motion for Waiver is granted, and it is

FURTHER ORDERED, by the Court, that the Motion for Leave to File a Substitute Petition Out of Time is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

FILED May 1, 1987

[5 FERC ¶63,018 at 65,138] National Fuel Gas Supply Corporation, Docket Nos. RP76-96, RP77-57 and RP77-14

Presiding Administrative Law Judge's Initial Decision In Natural Gas Pipeline Rate Cases

(November 14, 1978)

[Note: Opinion No. 58 affirming the Initial Decision was issued August 6, 1979, and appears at 8 FERC ¶61,135.]

[65,139] Appearances

Leon A. Allen, Jr. and Andrew Gansberg for National Fuel Gas Supply Corporation.

George L. Weber for Peoples Natural Gas Company.

Gordon P. MacDougall for the Pennsylvania Public Utility Commission.

Richard A. Solomon, Dennis Lane and Peter H. Schiff for the Public Service Commission of the State of New York.

Donald C. Shepler for the Staff of the Federal Energy Regulatory Commission.

BENKIN, Presiding Administrative Law Judge:

I. Nature of the Case.

This Initial Decision disposes of the contested issues in two cases, both of which arise out of general rate increases filed by National Fuel Gas Supply Corpora-

tion (Supply), a jurisdictional natural gas pipeline. The cases were jointly tried and were thereafter consolidated by Commission order of June 5, 1978.

The first of the rate increases was filed on April 30, 1976. Assigned Docket No. RP76-96, it was designed to produce additional revenues of $6,536,000 per year. Supply sought a June 1, 1976 effective date for the tariff changes. By order issued on May 28, 1976, the Federal Power Commission 1/ suspended the rate increases for five months, and the new rates became effective subject to refund on November 1, 1976. The May 28 order also directed an evidentiary hearing for the purpose of determining whether the increased rates are just and reasonable.

On April 29, 1977, Supply filed a second general rate increase. This one was designed to produce an annual revenue

increase of $5,449,000. The filing was assigned Docket No. RP77-57. By FPC order of May 27, 1977, the increased rates were suspended for five months. They took effect subject to refund on November 1, 1977, thereby locking in the rates filed in Docket No. RP76-96. As it had previously done, the Commission again ordered a hearing on the justness and reasonableness of the rate increase.

Also involved in these cases, although no litigated issues arise therefrom, is a filing which Supply made on November 17, 1976 in Docket No. RP77-14. That filing proposed a $2,779,744-per-year increase in rates for the purpose of tracking higher rates that Tennessee Gas Pipeline Company had proposed to charge Supply under two gas-transportation rate schedules, T-1 and T-2. Tennessee had filed increases in its rates for service

under those schedules on July 30, 1976. By order issued December 9, 1976, the Commission permitted Supply's filing to take effect, after suspension, on February 1, 1977 (the effective date of Tennessee's rate increase), consolidated it with Docket No. RP76-96 for decision, and ordered a hearing on it.

Pursuant to the aforementioned Commission orders, the Staff filed its "top sheets," summary statements of the cost of service which, in each case, the Staff believed would produce just and reasonable rates. 2/ Thereafter, the parties 3/ negotiated for settlement and managed to reach a mutually-satisfactory accommodation resolving all but four of the issues in Docket Nos. RP76-96 and RP77-57, the two general rate increase cases. (There is no contest about the validity of the tracking filing in Docket No. RP77-14).

In the general rate increase cases, the parties have agreed that, except for the four items in dispute and adjustments which must be made to other items to reflect resolution of the disputes, Supply's actual expenses for the locked-in period would be used to compute the cost of service in Docket No. RP76-96, and the figures appearing in the Staff's cost-of-service exhibit (Ex. 104) would be used to compute the cost of service in Docket No. RP77-57.

The four unsettled issues, which were reserved for disposition through litigation, are (1) Rate of return on equity; (2) Depreciation rates; (3) Pricing of pipeline production; and (4) Rate design.

Prehearing conferences were held on September 12, 1977, October 12, 1977 and April 11, 1978. 4/ The hearings began on April 11, 1978 and concluded, after five

days of hearing sessions, on April 27, 1978. Simultaneous initial and reply briefs were filed.

II. The Company.

An acquaintance with the corporate history and structure of the National Fuel Gas complex is helpful in understanding several of the litigated issues. Supply, the company whose rates are at issue here, is a wholly-owned subsidiary of National Fuel Gas Company (NFG), a registered public utility holding company. All of Supply's outstanding securities are held by NFG, which provides all of Supply's financing. Supply's business is the production, storage, transportation, and sale for resale of natural gas in interstate commerce. It obtains most **[65,140]** of its natural gas supplies by purchase from other pipeline systems such as Tennessee Gas Pipeline Company, Transcontinental Gas

Pipe Line Corporation, Consolidated Gas Supply Corporation, and Columbia Gas Transmission Corporation. Supply's primary customer is National Fuel Gas Distribution Corporation (Distribution), which is also a wholly-owned subsidiary of NFG. Sales to Distribution account for more than 98% of Supply's total annual gas sales. Supply also provides natural gas service to four non-affiliated local gas distributors. Through Distribution's retail operations, natural gas is supplied to end-users in a service area which includes western New York State (the Buffalo, N.Y. metropolitan area is the major market), northwestern Pennsylvania (including Erie, Pa.), and two counties in northeastern Ohio.

The current corporate arrangement, under which Supply performs the jurisdictional interstate transportation and sale-

for-resale functions, while Distribution engages entirely in non-jurisdictional intrastate distribution and retail sales activities, came into being in 1974. Before then, there were three operating subsidiaries of NFG: Iroquois Gas Corporation, Pennsylvania Gas Company, and United Natural Gas Company. Each of the subsidiaries engaged in jurisdictional production, purchase, storage, transportation, and (except for Iroquois) sale for resale of natural gas in a distinct part of the service area and also performed non-jurisdictional local distribution of gas within its service territory. 5/ In 1974, the Federal Power Commission approved a corporate realignment which created Supply and Distribution as the principal operating subsidiaries of NFG. 6/

* * * * *

[65,148] V. Pipeline Production.

In addition to its natural gas transportation and sale business, Supply engages in the production of natural gas from Appalachian wells. The production is used as part of the pipeline's system supply. Supply's pipeline production in 1976 amounted to 6,054 MMcf, or 2.35% of the system's total intake. 51/ The issue in the case is how Supply's own production should be priced at the applicable national rate for gas of its vintage? There is no question about the rate consequences of the two approaches: pricing the gas at the national rate, rather than on a cost-of-service basis, would add significantly to Supply's cost of service, increase its revenues, and increase its rates. 52/

When Supply filed its rate-increase cases, it priced the pipeline production gas on a cost-of-service basis. The Staff took exception to this treatment and

claimed that pricing the gas at the higher maximum national rate was mandatory under the Commission's Regulations. Hence, we are here reviewing a somewhat anomalous reversal of the usual positions of the parties, with the Staff attempting to increase the filed cost of service for this item. 53/

It is the Staff's position that an increase in the cost of Supply's pipeline-production gas is mandated by Section 2.66(a) of the Commission's General Policy and Interpretations, 18 CFR 2.66(a), which provides, in pertinent part, as follows:

> As a matter of policy in future pipeline rate proceedings, gas produced by pipelines or by their affiliates from leases acquired after the date of this order will be priced for ratemaking purposes at the just and reasonable area rate applicable to gas of a vintage corresponding to the date of completion of the first well on the lease . . .

In Opinion No. 699-H, 52 FPC 1604, 1634-1636 (1974), the Commission amended its Regulations to provide that pipeline-produced natural gas which would qualify as "new" gas under the vintaging concepts announced in that Opinion (i.e., gas produced from leases acquired after October 7, 1969, the date Section 2.66(a) was first issued (see Opinion No. 568, 42 FPC 738 (1969)) and from wells drilled after January 1, 1973, "may be priced" at the national rates established by Opinion No. 699-H. The amendment is now codified in Section 2.56a(k) of the Regulations, 18 CFR 2.56a(k).

Staff's witness Fisher examined all of the pipeline-production gas which Supply estimated would flow into its system during the year ending December 31, 1975, the test period in Docket No. RP76-96. Of the 8,446,100 Mcf involved, Fisher esti-

mated that 494,700 Mcf would qualify for national rate treatment under Section 2.56a(a) of the Commission's Regulations, 18 CFR 2.56a(a); 104,200 Mcf would be eligible for the base rate of $0.93 per Mcf, plus escalations and adjustments, under subparagraph (3) of §2.56a(a). 54/ The cost of this gas at the applicable national rate would have been $727,462, according to Fisher. In its rate-increase filing, however, Supply had sought $277,548 as the cost of this gas, using a cost-of-service method of determining the cost. The difference between the two figures, $449,914, represents the upward adjustment of Supply's cost of service which the Staff seeks to impose. 55/

To his credit, Fisher testified that his advocacy of pricing Supply's pipeline production at the higher national rates was manifested under compulsion of what he

regarded as the Commission's firm policy. If that putative mandate did not exist, Fisher said, "it is my opinion that National Fuel should receive no more than cost-of-service when cost-of-service is less than value at national rates." 56/ The New York PSC reduced its views on the point to a footnote in its initial brief, which declared the pricing of pipeline production gas to be an uncontested issue and urged adoption of cost-of-service treatment, based upon the above-quoted language in Fisher's testimony. 57/ What the New York PSC missed, of course, was Fisher's view that the quoted opinion related to a condition contrary to fact. Supply has remained thoroughly tacit about the whole business. It finds itself in the incongruous position of facing an adversary, one supposed to protect the ratepayers' interests, whose complaint is that

the filed cost of service asks the ratepayers to pay too little--at least as to this item. And so Supply has played the role of the Shakespearean lady who allowed herself to be dragged kicking and screaming (but not too hard) towards a consummation she devoutly desired.

But that consummation is not to be realized at this stage of the proceeding. Staff's view that Section 2.66(a) unequivocally requires all pipeline production to be priced at the national rate ceiling, no more and no less, is simply wrong where, as here, the pipeline has sought to include a lower rate in its cost of service. True, that provision of the Commission's Regulations provides that pipeline production will be priced at the national rate. But the national rates themselves are not firm, fixed minimum rates. They are ceiling rates. There is nothing in Section

2.56a(a) of the Regulations, establishing the national rates for wellhead sales of **[65,149]** natural gas, that in any way precludes or makes unlawful a sale at a rate below the ceilings therein established. Hence, a rate of $1.00, for example, for gas from a well commenced after January 1, 1975, would be deemed just and reasonable and would comply with the national rate decision embodied in Section 2.56a(a)(1) of the Regulations, which fixed a just and reasonable base rate of $1.42 for gas of that vintage. The validity of the proposition that the national rates established by the Federal Power Commission fix a ceiling and not a floor is confirmed by observing that the Commission, when it wanted to establish minimum rates for wellhead sales, did so very explicitly. See, e.g., Opinion No. 468, 34 FPC 159, 231-232 (1965), aff'd sub nom. Permian

Basin Area Rate Cases, 390 U.S. 747, 821 (1968); 18 CFR 154.109b(c). There is nothing in Section 2.56a or elsewhere which lends support to the contention that the national rates are intended to be minimum rates.

Since the national rates are ceiling rates, it follows that when a pipeline files a cost of service seeking to price its own production below those rates, it has, to that extent, conformed to the mandate of Section 2.66(a). It makes no difference whether the claimed cost of pipeline production was calculated on a cost-of-service basis or otherwise. In determining whether rates for natural gas are just and reasonable, "it is the result reached not the method employed which is controlling." 58/ Supply's filing as to the cost of pipeline production gas was, therefore, in conformity with the Commis-

sion's Regulations. Staff's attack on the filing, grounded in the alleged failure to comply with the Regulations on that subject is rejected.

* * * * *

[65,152] VII. Ultimate Findings and Order.

In consideration of the foregoing findings of fact and conclusions of law, I further find that:

(1) National Fuel Gas Supply Corporation (Supply) is a "natural-gas company" within the meaning of Section 2(6) of the Natural Gas Act, 15 U.S.C. 717a(6), and its rates and charges are, therefore, subject to regulation by the Federal Energy Regulatory Commission under and pursuant to Section 4 of said Act, 15 U.S.C. 717c.

(2) In Docket Nos. RP76-96 and RP77-57, Supply filed with the Federal Power Commission revisions designed to increase its rates and charges for jurisdictional

service. In each of those dockets, the Federal Power Commission suspended the use of the revised rates and charges for a period of five months and entered upon a hearing concerning the lawfulness of said rates and charges. Thereafter, in each of the above-mentioned dockets, the rates and charges filed by Supply took effect subject to refund.

(3) On October 1, 1977, the functions, powers, and duties of the Federal Power Commission under the Natural Gas Act, together with the Commission's jurisdiction over this case, were transferred to the Federal Energy Regulatory Commission under Section 402 of the Department of Energy Organization Act, 42 U.S.C. 7172 and Executive Order No. 12009, 42 F.R. 46267 (1977).

(4) After full hearings duly had and completed, the rates and charges for ser-

vice filed by Supply in Docket Nos. RP76-96 and RP77-57 are found to be unjust, unreasonable, or otherwise unlawful to the extent that they do not conform to the stipulation of the parties and the findings and conclusions set forth in this Initial Decision.

(5) Supply should be required to recompute its rates and charges for jurisdictional service in Docket Nos. RP76-96 and RP77-57 in accordance with the stipulations of the parties and the findings and conclusions set forth in this Initial Decision and to file new rates and charges for such service as so recomputed.

(6) Supply should be required to refund to its jurisdictional customers the difference between the amounts actually demanded and collected under the revised tariff sheets filed in Docket Nos. RP76-96 and RP77-57 and the amounts it would have

collected under rates and charges recomputed in accordance with paragraph 5, supra, together with interest thereon in accordance with law.

WHEREFORE, it is ordered, subject to review by the Commission on appeal or on the Commission's own motion, as provided in the Rules of Practice and Procedure, that--

(A) The increased rates and charges filed by Supply in Docket Nos. RP76-96 and RP77-57 are disallowed to the extent they do not conform to the principles set forth in this decision.

(B) Within 60 days of the date this Decision is issued, Supply shall file in each of the above-specified dockets a revised cost of service and any amendments to its rates and charges in its jurisdictional tariffs needed to bring said rates and charges into conformity with the prin-

ciples set forth in this Decision, subject to the approval of the Commission.

(C) Within 30 days of the Commission's approval of Supply's amended tariff sheets submitted pursuant to paragraph (B), supra, Supply shall refund to its jurisdictional customers all amounts collected from those customers in excess of amounts which would have been collected from them under rates and charges conforming to the principles set forth in this Decision, together with interest upon such excess at the rate of nine percent per annum from the date of payment to the date of refund.

(D) Within 15 days after refunds have been made pursuant to paragraph (C), supra, Supply shall file with the Commission a report showing the monthly billing determinants and revenues for service under the proper present and adjudicated

rates and charges in each of the dockets. The report shall also show the amounts refunded, together with the computation of interest paid thereon, to each customer. A copy of the report shall be sent to the State commission which regulates rates and charges for retail natural gas service in the States of New York and Ohio and the Commonwealth of Pennsylvania.

ISAAC D. BENKIN,

Presiding Administrative Law Judge.

--Footnotes--

1/ Under §4 of the Natural Gas Act, 15 U.S.C. 717, the Federal Power Commission had jurisdiction to determine whether, and the extent to which, rates and charges of natural gas pipelines wholesaling gas in interstate commerce were just, reasonable, and otherwise lawful. On October 1, 1977 , the FPC was abolished and its jurisdiction to administer §4 of the Natural Gas Act was transferred to the Federal Energy Regulatory Commission by §402(a)(1)(C) of the Department of Energy Organization Act, 42 U.S.C. 7172(a)(1)(C). These cases are continued before FERC pursuant to §705(b) of the DOE Organization Act, 42 U.S.C. 7925(b).

2/ See Administrative Order No. 157, "Top Sheet Procedures in Natural Gas and Public Utility Rate Cases," issued April 1, 1976.

3/ Parties to these cases, besides the Staff and Supply, include the Public Service Commission of the State of New York, the Pennsylvania Public Utility Commission, and Peoples Natural Gas Company, a non-affiliated wholesale customer of Supply.

4/ The Docket No. RP76-96 proceeding was assigned to Judge Convisser until his retirement on December 31, 1977 caused him to become unavailable; then it was reassigned to the undersigned.

5/ The Iroquois territory was located largely in western New York, Pennsylvania Gas Company operated in northwestern Pennsylvania and Chautauqua and Cattaraugus Counties in New York. United also served areas in northwestern Pennsylvania (south and east of the Pennsylvania Gas Company territory) as well as portions of Trumbull and Ashtabula Counties in Ohio.

6/ Iroquois Gas Corp., 51 FPC 1507, 52 FPC 69 (1974).

* * * * *

[65,154] 51/ Tr. 267.

52/ According to Staff's witness Donald Fisher, the difference amounts to $449,914 for the 12-month period ending December 31, 1975, the test year in Docket No. RP76-96. No one quarrels with Fish-

er's calculation, which is explained at mimeo p. 30, infra.

53/ Of course, as Staff acknowledges, the Natural Gas Act precludes an increase in any constituent of the cost of service that would increase the overall rates filed by the company. That is not a problem in this case, however, because reductions in other elements of the filed cost of service (e.g., rate of return on equity) have left substantial leeway for an increase in the cost of pipeline-production gas.

54/ See Ex. 19, Schedule 1, Sheet 2.

55/ See Id. at Schedule 1, Sheet 1.

56/ Tr. 295.

57/ Initial brief, p. 1, n.1.

58/ F.P.C. v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

[8 FERC ¶61,135 at 61,515] Opinion No. 58

National Fuel Gas Supply Corporation, Docket Nos. RP76-96, RP77-14 and RP77-57

Opinion and Order Affirming Initial Decision

(Issued August 6, 1979)

[Note: Initial decision in natural gas pipeline rate cases was issued

November 14, 1978, and appears at 5 FERC ¶63,018.]

Syllabus

Commission affirms the initial decision involving four unsettled issues in pipeline's rate increase applications. The judge's technique for calculating return on common equity and depreciation rates for a subsidiary of a non-jurisdictional parent were deemed reasonable and justified. Commission also affirmed that pipeline's price of production should be on a cost-of-service basis rather than on applicable nationwide rates, that proposed surcharges should be abolished in favor of uniform system-wide rates, and that lower rates should apply to receivers of low Btu manufactured gas.

[1] PIPELINE-RATEMAKING & REGULATION
Capitalization
Affiliated Companies

For purposes of filing a rate of return of a jurisdictional subsidiary, it is appropriate to impute to it the capital structure of a parent corporation engaged in business other than the provision of jurisdictional natural gas service, if the long-range risks of doing business are similar.

[2] PIPELINE-RATEMAKING & REGULATION
Capitalization
Affiliated Companies

[61,516] It is not appropriate to derive rate of return on subsidiary's equity capital from an analysis of the past performance and future prospects of the parent corporation's stock, when this performance is severely influenced by the weakness of a non-jurisdictional utility.

[3] PIPELINE-RATEMAKING & REGULATION
Rate of Return
Affiliated Companies

Where subsidiary's rate of return on equity capital cannot be imputed from the

parent corporation's stock performance, it must be viewed as a separate entity. It is appropriate to compare the business risks of the subsidiary jurisdictional pipeline, apart from the parent, with other jurisdictional pipelines.

[4] PIPELINE-RATEMAKING & REGULATION
Management
Rate Base
Facilities

When Calculating its depreciation rate based on projected declines in gas supplies, the pipeline must present a study of existing and future supplies. Selection of a termination date of future gas supplies on the basis of management discretion is not permissible.

[5] PRODUCER REGULATION
Well-Head Price
PIPELINE-RATEMAKING & REGULATION
Cost of Service
Purchased Gas

Where the pipeline files a cost of service seeking to price its own produc-

tion below national rates, it has conformed to the ceiling rates established by Section 2.66(a) of the Commission's General Policy and Interpretations.

[6] PIPELINE-RATEMAKING & REGULATION
Cost Classification & Allocation

Where pipeline has an integrated system, purchased gas costs must be allocated on a rolled-in basis. Under Consolidated maintenance of rate zones in such a system is forbidden. An integrated system requires that all users of the system benefit from all gas system receives.

[7] PIPELINE-RATEMAKING & REGULATION
Cost Classification & Allocation

An integrated pipeline system may not recover the costs of a state gross receipts tax by imposing a surcharge on sales in the state. Such expenses must be allocated among pipeline's jurisdictional customers on a rolled-in basis.

[8] PIPELINE-RATEMAKING & REGULATION

Rate Design

When the heat content of the gas delivered at some points on the system varies materially, the pipeline should adjust downward the rates of those who receive substandard gas.

[61,517]
[9] PIPELINE-RATEMAKING & REGULATION
Rate Design

Where the Commission orders a pipeline to change its filed rate design by eliminating rate-zones and surcharges, the equities favor such changes being made at one time, and on a prospective basis, only.

Appearances

Leon A. Allen, Jr. and Andrew Gansberg for National Fuel Gas Supply Corporation.

Peter H. Schiff, Richard A. Solomon, and Dennis Lane for the Public Service Commission of the State of New York

Kathleen H. Larkin, Frank B. Wilmarth, and Gordon P. MacDougall for the Pennsylvania Public Utility Commission

George L. Weber for the Peoples Natural Gas Company

Donald C. Shepler and James L. Blasiak for the Staff of the Federal Energy Regulatory Commission

[Opinion No. 58 Text]

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

This proceeding involves two general rate increase applications filed by National Fuel Gas Supply Corporation (National Fuel). 1/ The filing in Docket No. RP76-96 was submitted by National Fuel on April 30, 1976, and was suspended and set for hearing by the FPC on May 28, 1976. 2/ The filing in Docket No. RP77-57 was submitted on April 29, 1977, and was suspended and set for hearing by the FPC on May 27, 1977. The cases were jointly tried and were thereafter consolidated by Commission order of June 5, 1978. The active participants in this proceeding are

National Fuel, the Public Service Commission of the State of New York (New York), the Pennsylvania Public Utility Commission (Pennsylvania), and the Commission staff.

Many of the elements of the cost of service in both dockets were apparently agreed upon during informal settlement conferences among the parties. Four unsettled issues were reserved for hearing and are the subject of this order. These issues are (1) return on common equity, (2) depreciation rates, (3) pricing of pipeline production, and (4) rate design.

Following the hearing and submission of briefs, the presiding judge issued his initial decision on November 14, 1978. The judge ruled (1) that National Fuel should be allowed a return on common equity of 12 percent in Docket No. RP76-96 and 12.25 percent in Docket No. RP77-57 in accordance with the staff's recommenda-

tions, (2) that the depreciation rates recommended by staff for the various categories of National Fuel's plant should be approved, 3/ (3) that National Fuel's own production, amounting to about 2.35 percent of its total system supply should be priced on a cost of service basis rather than on the basis of applicable nationwide rates, (4) that National Fuel's proposed surcharge on sales made in New York should be **[61,518]** abolished in favor of a uniform system-wide rate, and (5) that a Btu adjustment should be applied to National Fuel's sales of low Btu manufactured gas in New York. 4/

Exceptions to the initial decision were filed by National Fuel, New York, Pennsylvania and the staff. Upon review of the parties' exceptions, the Commission finds them to be without merit. The Commission finds the conclusions reached by

the judge in his initial decision are reasonable, justified by the evidence and consistent with precedent. The initial decision shall therefore be affirmed. The Commission notes that the judge's decision on the New York surcharge issue is fully consistent with the Commission's recent decision on this same issue in National Fuel's Docket No. RP76-4. 5/ The Commission also notes the judge's ruling on the Btu adjustment issue is consistent with the Commission's recent decision in a similar case involving Transwestern Pipeline Company, Docket No. RP75-74. 6/

In his initial decision the judge states that the issues, other than those reserved for hearing, have been settled by the parties. The parties have agreed that National Fuel's actual expenses for the locked-in period will be used to compute the cost of service in Docket No. RP76-96,

and the figures appearing in Exhibit 104 will be used to compute the cost of services in Docket RP77-57. No exception to the judge's statement has been filed and we will accept the accommodation of the parties.

The Commission orders:

(A) The presiding judge's initial decision issued herein on November 14, 1978 is affirmed.

(B) Within 30 days of the date of this order, National Fuel Shall submit revised tariff sheets and revised rates in accordance with the agreement of the parties, the initial decision in these dockets, and this order.

(C) Within 30 days after acceptance of the revised tariff sheets and rates submitted pursuant to paragraph (B) above, National Fuel shall refund to its jurisdictional customers all amounts collected

in excess of the approved rates together with interest at the rate of 9 percent per annum. Within 10 days thereafter National Fuel shall submit a report setting forth the calculation of refunds and interest paid.

(D) Upon compliance by National Fuel with the terms of this order, this proceeding shall be terminated.

-- Footnotes --

1/ This proceeding was commenced before the Federal Power Commission (FPC). By the joint regulation of October 1, 1977 (10 CFR §1000.1), it was transferred to the FERC. The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

2/ The filing in Docket No. RP77-14 involves an application by National Fuel to track higher rates proposed by one of its pipeline suppliers, Tennessee Gas Pipeline Company. On December 9, 1976 the FPC suspended National Fuel's filing until February 1, 1977, and consolidated it with Docket No. RP76-96 for purposes of hearing and decision. There is no contest in this proceeding concerning the validity of the tracking filing on Docket No. RP77-14.

3/ For the most part the staff recommended that National Fuel's existing depreciation rates be retained. The staff did, however, recommend an increase in the depreciation rate for (1) underground storage plant from 3.50 percent to 4.30 percent, (2) local storage plant from 3.25 to 3.90 percent, and (3) transmission plant from 3.25 to 3.75 percent.

4/ The judge found that National Fuel should be permitted to increase its overall volumetric rate with a related discount to the low Btu gas customers or, alternatively, that it be permitted to change its billing from a volume to a heat value basis.

5/ Opinion No. 45, issued June 28, 1979, 7 FERC ¶61,317.

6/ Opinion No. 43, issued June 25, 1979, 7 FERC ¶61,297.

[Regs. Preambles 1982-1985, FERC Stats. and Regs. (CCH) ¶30,588 at 31,085] 49 F.R. 33849 (August 27, 1984).

18 CFR Parts 2, 154,201, 270 and 271

[Docket Nos. RM83-72-000 and RM82-16-000; Order No. 391]

Production Under Section 2(21) of the Natural Gas Policy Act of 1978

Issued: August 22, 1984

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations relating to first sales of pipeline production under the Natural Gas Policy Act of 1978 (NGPA). This final rule implements the Supreme Court's decision in Public Service Comm'n of New York v. Mid-Louisiana Gas Co., 103 S. Ct. 3024 (1983). The Commission is including within the definition of "first sale" in section 2(21) of the NGPA the intracompany transfer of natural gas produced by the production divisional unit of a pipeline to its transmission divisional unit. The Commission defines this transfer as one that occurs at the wellhead.

The final rule also establishes five special rules for sales by interstate

pipelines. First, a pipeline may continue to price certain gas on a cost-of-service basis. Such a valuation would be reviewed on a case-by-case basis in the pipeline's section 4 or 5 rate case pursuant to the requirements of NGPA sections 104(b)(2) and 109(b)(2). Second, certain guidelines are established for pricing gas that previously was priced under a cost-of-service basis but which would now qualify for either the NGPA section 104 or 109 maximum lawful prices. Third, an interstate pipeline must file an intracompany operating statement to reflect how it intends to manage its gas supply with respect to gas it produces. Fourth, the Commission will apply the affiliated entities test in NGPA section 601(b) to evaluate a pipeline's pricing of gas it produces. Fifth, an interstate pipeline may pass through

retroactive rate increase if it reserved the issue in its rate settlement.

In addition, the final rule consolidate §§207.203(c) and (g) of the regulations that deal with affiliated production. New §207.203(c) includes within the definition of first sale all sales of gas by the affiliate.

DATE: This rule will become effective September 26, 1984.

* * * * *

[31,086] Under the NGA, the Commission developed a regulatory program under which it determined the cost (or value) of a pipeline's own production in one of two ways. Production of the pipeline's "old gas" 11/ was valued on a cost-of-service basis, a method which considers the pipeline's costs of exploration and production (such a drilling, lease acquisition, and operation costs). The valuation of the

pipeline's new gas production was based on the applicable area or nationwide rates (established by the Commission), 12/ which independent producers were permitted to charge for the gas they produced and sold.

Congress then established categories of ceiling prices applicable to certain first sales of natural gas under Title I of the NGPA, effective December 1, 1978. Soon after the enactment of the NGPA, the question arose whether the higher NGPA ceiling prices, which applied to sales by independent producers and affiliated producers, were also meant by Congress to apply to gas produced by pipelines. The question, in other words, was whether pipeline-produced gas would be involved in a "first sale" and therefore eligible to be priced at the higher NGPA rate levels. This issue was particularly relevant to that portion of a pipeline's production

which had been valued by the Commission under the NGA at rate levels lower than those in the NGPA.

Initially, the Commission interpreted the language of the NGPA to prohibit most pipeline production from qualifying as a matter of law for the NGPA first sale prices. 13/ Therefore, the Commission required interstate pipelines to continue pricing their old gas, and specially-treated new gas, on a cost-of-service basis, not at NGPa levels. 14/

On appeal by several pipelines, the Fifth Circuit Court of Appeals overturned the Commission's rules denying first sale treatment to pipeline production. 15/ The Fifth Circuit held that the NGPA requires the Commission to treat all pipeline production as subject to first sale treatment. It also held that the first sale occurs at the intracorporate transfer

point, i.e., the point where the gas moves between the pipeline's production and transmission divisions, not at a downstream transfer point, i.e., the point where the gas is sold to the pipeline's resale customers.

In Mid-Louisiana, the Supreme Court overturned the Commission's first sale rule and held that "[the Fifth Circuit] Court of Appeals correctly concluded that Congress intended pipeline production to receive first sale pricing." 16/ The Supreme Court also concluded that:

> Unlike the Court of Appeals, however, we believe Congress intended to give the Commission discretion in deciding whether first sale treatment should be provided at the intracorporate transfer or at the downstream transfer. The case should be remanded to the Commission so that it may make that choice. 17/

* * * * *

[31,095] C. Other Issues

1. Retroactive Effect of the Rule

The Mid-Louisiana decision invalidated the Commission's existing pipeline production regulations implementing the NGPA. Any new regulations must be effective as of December 1, 1978, the effective date of the NGPA. In the NOPR, the Commission raised the issue whether a pipeline could retroactively value its gas to reflect the difference between the otherwise applicable NGPA ceiling prices and the costs actually recovered for a pipeline's production since December 1, 1978. The NOPR proposed to retain the current Commission policy developed in several PGA proceedings initiated at the Commission after the Fifth Circuit's Mid-Louisiana decision. The policy is that if an interstate pipeline specifically reserved the issue of NGPA rate treatment for its own production in a settlement agreement, then

the interstate pipeline would be entitled to retroactive collection for its production. 33/ The Commission also determined that a failure to specifically reserve the issue would preclude a pipeline from recovering those costs retroactively.

* * * * *

Only two commenters argued that the Commission should permit all pipelines to retroactively collect NGPA rates regardless of whether the issue was reserved in a rate settlement. One of these commenters argued that a pipeline should not be penalized for the Commission's erroneous interpretation of the statute.

The Commission recently provided the following analysis in a PGA proceeding:

> If a pipeline (along with the Commission Staff and intervenors) has agreed to a general Section 4 rate settlement which is subsequently approved by the Commission and there is no specific reservation of an issue

> (such as the pipeline production issue) in the terms of the settlement agreement, a strong argument can be made that each party (including the pipeline) to the agreement "gave up" the right . . . in order to reach an agreement. As the court stated in Texas Eastern Transmission Corp. (supra, at 357):
>
> > A settlement by its very nature is a compromise - a process by which positions, legal or factual, no matter how seriously maintained or legally supportable, are surrendered in whole [31,096] or in part to achieve peace. If it is to be really a settlement, the parties will have weighed, consciously or unconsciously, the relative importance of subsidiary factors. Each party must give. How much to give is a matter for each party. 34/

The Commission believes that all interested parties at the time of settlement negotiations had the opportunity to decide whether or not to reserve this issue. Having either reserved the issue or not, the parties must be bound by their decisions. Nor is the Commission persuaded by

the argument that ratepayers might suffer. Ratepayers were undoubtedly involved when the settlement was reached in those cases in which the pricing issue was reserved. Their opportunity to object has passed.

One commenter urged the Commission to promulgate regulations to articulate its policy that retroactive collection be permitted if the issue was reserved in the settlement, and not be permitted if the issue was not reserved. The Commission does not believe that it is necessary to codify this policy in light of clear Commission precedent and the discussion above.

* * * * *

-- Footnotes --

[31,098] 11/ A pipeline's "old gas" was defined as gas from the company's wells first drilled before January 1, 1983, on leases acquired before October 8, 1969. See Pipeline Production Area Rate Proceeding (Phase I), 42 FPC 738, 745 (1969), aff'd sub nom., City of Chicago v. FPC,

458 F.2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972); Just and Reasonable **[31,099]** National Rates For Sales of Natural Gas, 52 F.P.C. 1604, 1634-36 (1974).

12/ If a pipeline could demonstrate that "special circumstances" warranted different treatment in its case, the Commission would authorize it to value its new gas on a cost-of-service basis. Pipeline Production Area Rate Proceeding (Phase I), supra note 11, at pp. 745, 752; 18 CFR 2.66(a)(4) (1983). In addition, on review of several settlements reached in pipeline rate cases, the Commission approved cost-of-service pricing for a pipeline's new gas.

13/ See Final Rule Governing the Maximum Lawful Prices for Pipeline, Distributor, or Affiliated Production, 44 FR 66577 (Nov. 20, 1979) (Order No. 58); Final Rule, Pricing of Pipeline Production Under the Natural Gas Act, 45 FR 53091 (Aug. 11, 1980) (Order No. 98); and Order Denying Rehearing of Order No. 58 and Order No. 98 and Clarifying Order No. 98, 45 FR 67083 (Oct. 9, 1980) (Order No. 102).

14/ After enactment of the NGPA, the Commission acting under its discretionary authority in the NGA allowed interstate pipelines to value their new gas, which had not been specially granted cost-of-service treatment, at levels comparable to the relevant NGPA prices. This decision provided "parity" pricing treatment for pipeline production of this new gas with production of new gas by independent and

affiliated producers. See Commission Order Nos. 98 and 102, supra note 13.

15/ Mid-Louisiana Gas Co. v. FERC, 664 F.2d 530 (5th Cir. 1981), aff'd in part and rev'd in part, Public Service Comm'n of New York v. Mid-Louisiana Gas Co., 103 S. Ct. 3,024 (1983).

16/ 103 S. Ct. at 3,035.

17/ Id. at 3,037.

[31,100] 33/ The notice cited, as an example, Consolidated Gas Supply Corp., 20 FERC ¶61,243 (Aug. 31, 1982) (Docket No. TA82-2-22-000), appeal pending, Consolidated Gas Supply Corp. v. FERC, No. 79-1546 (4th Cir., argued Mar. 6, 1984).

34/ El Paso Natural Gas Co., 20 FERC ¶61,443, at p. 61,911 (1982), appeal pending, Arizona Electric Power Cooperative, Inc. v. FERC, Nos. 82-2172, (D.C. Cir., argued May 30, 1984).

Natural Gas Act, 15 U.S.C. §§717, et seq.

Section 4, 15 U.S.C. §717c

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas

subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the

Commission, within such time (not less than sixty days from the date this act takes effect) and in such forms as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the pub-

lic. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading

by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the

proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing; the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought

to be increased, the burden of proof to show that the increased rate or change is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

[15 U.S.C. 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTIONOR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or

that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

[15 U.S.C. 717d]

REHEARING; COURT REVIEW OF ORDERS

Sec. 19. (a) Any person, State, municipality, or State commission is aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the

issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have mad application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any

finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file

with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that

there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence to taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or cert-

ification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

[15 U.S.C. 717r]

TITLE V - ADMINISTRATION, ENFORCEMENT, AND REVIEW

SEC. 501. GENERAL RULEMAKING AUTHORITY.

(a) IN GENERAL. - Except where expressly provided otherwise, the Commission shall administer this Act. The Commission, or any other Federal officer or agency in which any function under this

Act is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act.

(b) AUTHORITY TO DEFINE TERMS. - Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this Act. Any such definition shall be consistent with the definitions set forth in this Act.

(c) DELEGATION OF CERTAIN DETERMINATIONS. - The Commission may delegate to any State agency (with the consent of such agency) any of its functions with respect to sections 105, 106(b), and 109(a)(1) and (3).

[15 U.S.C. 3411]

TITLE VI - COORDINATION WITH NATURAL GAS ACT; MISCELLANEOUS PROVISIONS

SEC. 601. COORDINATION WITH THE NATURAL GAS ACT.

(a) JURISDICTION OF THE COMMISSION UNDER THE NATURAL GAS ACT. -

(1) SALES. -

(A) NATURAL GAS NOT COMMITTED OR DEDICATED. - For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely be reason of

any first sale of such natural gas.

(B) COMMITTED OR DEDICATED NATURAL GAS. - Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely be reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is -

(i) high-cost natural gas (as defined in section

107(c) (1), (2), (3), or (4) of this Act);

(ii) new natural gas (as defined in section 102(c) of this Act); or

(iii) natural gas produced from any new, onshore production well (as defined in section 103(c) of this Act).

(C) AUTHORIZED SALES OR ASSIGNMENTS. - For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas-

(i) authorized under section 302(a) or 311(b); or

(ii) pursuant to any assigned authorized under section 312(a).

(D) NATURAL GAS COMPANY.- For purposes of the Natural Gas Act, the term "natural gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) ALASKAN NATURAL GAS.- Subparagraph (B) (ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and

transported through the transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) TRANSPORTATION. -

(A) JURISDICTION OF THE COMMISSION. - For purposes of section 1(b) of the Natural Gas Act the provisions of such Act and jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is -

(i) pursuant to any order under section 302(c) or section 303(b), (c), (d), or (h) of this Act; or

(ii) authorized by the Commission under section 311 (a) of this Act.

(B) NATURAL GAS COMPANY.- For purposes of the Natural Gas Act, the term "natural gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) CHARGES DEEMED JUST AND REASONABLE.

(1) SALES. -

(A) FIRST SALES. - Subject to Paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in

any first sale of natural gas shall be deemed to be just and reasonable if -

(i) such amount does not exceed the applicable maximum lawful price established under title I of this Act; or

(ii) there is no applicable maximum lawful price solely be reason of the elimination of price controls pursuant to subtitle B of title I of this Act.

(B) EMERGENCY SALES. - For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized under section 302(a) shall be deemed to be just and reasonable

if such amount does not exceed the fair and equitable price established under section and applicable to such sale.

(C) SALES BY INTRASTATE PIPELINES. - For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 311(b) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) ASSIGNMENTS. - For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid pursuant to the terms of any contract with respect to that

portion of which the Commission has authorized an assignment authorized under section 312(a) shall be deemed to be just and reasonable if such amount does not exceed the applicable maximum lawful price established under title I of this Act.

(E) AFFILIATED ENTITIES LIMITATION. - For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between

persons not affiliated with such interstate pipeline.

(2) OTHER CHARGES. -

(A) ALLOCATION. - For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 303 (b), (c), or (d) of this Act shall be deemed to be just and reasonable if such amount is prescribed by the President under section 303(h)(1).

(B) TRANSPORTATION. - For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation author-

ized by the Commission under section 311(a) of this Act shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) GUARANTEED PASSTHROUGH. -

(1) CERTIFICATE MAY NOT BE DENIED BASED UPON PRICE. - The Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) RECOVERY OF JUST AND REASONABLE PRICES PAID. - For purposes of sections 4 and 5 of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of

any amount paid with respect to any purchase of natural gas if -

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 201 (including any amendment under section 202), except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

[15 U.S.C. 3431]

§154.38 Composition of Rate Schedule

(d) Statement of Rate. (1) Except as permitted in §154.52, §154.82 and Part

282, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or conditions such as tax, commodity price index, wholesale price index or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or

charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to §154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided further, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part.

(4) A natural gas pipeline company may flow through changes in its cost of purchased gas 1/ pursuant to a purchased gas adjustment clause (PGA clause). The proposed clause must be filed with the Commission and shall not be effective un-

til approved by the Commission. No request for approval of a PGA clause will be considered unless the proposed clause meets the terms and conditions specified in paragraphs (d)(4)(i) through (viii) of this section. Any PGA clause approved by the Commission is subject to the conditions in paragraph (d)(4)(ix) of this section.

The first PGA rate adjustment to become effective on or after January 1, 1979, may reflect the calculation specified in clause (x).

(i) The proposed PGA clause shall be accompanied by a cost study in conformity with the requirements of §154.63. This study must be based upon actual costs for the 12 months of most recently available actual experience and may include annualization for changes which actually occurred in the 12 month period. If a cost-

of-service study having a test period ending less than 12 months prior to the date of submission of the proposed PGA clause is on file in another docket, that costs study may be utilized in lieu of filing a cost study with the proposed PGA clause.

(ii) The method(s) of determining changes in cost of gas purchased from producer and pipeline suppliers shall be separately established. Any purchase of deregulated high-cost gas from affiliated producers shall be so identified in the schedules of gas costs. Increases in cost of gas purchased from small producers shall be shown separately, and the provisions of Order No. 428 shall apply to these increases. Producer rate changes shall be applied to the commodity component of the existing rates of a pipeline company's two-part rates and shall be applied to a pipeline company's volumetric

rates in the manner which maintains the pipeline company's existing one-part rate design.

(iii) The purchases gas cost adjustment shall be reflected in the company's rates only when it represents a dollar amount equal to at least 1 mill ($0.001) per Mcf of annual jurisdictional sales. This limitation is not applicable to the unrecovered purchased gas costs for which provision is made in paragraph (d)(4)(iv) of this section.

(iv)(a) Rate changes which reflect both the projected cost of purchased gas and a revised surcharge to clear the amounts accrued in the deferred account for both producer and pipeline suppliers shall be computed and filed not more frequently than semi-annually. Pipeline companies may reflect in their rates such changes as are permitted to producers of

natural gas under the Natural Gas Policy Act of 1978. Pipeline companies with semi-annual adjustment dates may not reflect in their purchased gas pattern any supply which is not attached to its system as of the effective date of the proposed rate change.

* * * * *

(b) To assure recovery of all purchased gas costs, the Commission has prescribed deferred purchased gas cost accounts. For both Major and Nonmajor natural gas companies, the deferred account is "Account 191, Unrecovered purchased gas costs," 18 CFR Part 201, Balance Sheet Accounts, 191 and is used in conjunction with "Account 805.1, Purchased gas cost adjustments," 18 CFR Part 201, Operation and Maintenance Expense Accounts, 805.1. Pipelines using deferred accounting procedures shall be subject to the provisions

of these accounts. In order to qualify for carrying charges, the company is required to adopt the principles of interperiod income tax allocation in connection with the balances recorded in the unrecovered purchased gas cost account.

(c) Carrying charges shall be computed based on the ending balances in Account 191. The rate for computation of carrying charges shall be the current rate of interest on pipeline refunds set forth in §154.67(c)(2)(iii)(A) with interest compounded in the manner set forth in §154.67(c)(2)(iii)(B). Carrying charges shall be debited to Account 191 if the ending balance in Account 191 for the month is positive and shall be credited to Account 191 if the ending balance is negative. The carrying charges shall be computed monthly on the net balances in Account No. 191 and the related amounts in

Account Nos. 283 or 190, as appropriate, as of the end of the immediately preceding month.

(d) After the initial 6-month period following the effectiveness of the PGA clause and after the company has chosen to maintain an unrecovered purchase gas cost account (Account No. 191) the company shall adjust its rate(s), either positively or negatively, to include a surcharge to recover or return the balance which has accumulated in the unrecovered purchase gas cost account (Account No. 191) in the preceding 6-month period. This procedure will be followed in each succeeding 6-month period.

(v) The company shall file with the Commission and post pursuant to §154.16 at least 30 days prior to the date on which any change(s) in its existing rates is to become effective, a single tariff sheet,

entitled Original PGA-1, which contains the information in the margins as set out and required in §154.33(d) and which shows the following:

NOTICE OF PURCHASED GAS COST ADJUSTMENT RE CHANGE AT

Rate Schedule	Base tariff rate 2/	Current adjustment	Cumulative adjustment	Rate after adjustment

Simultaneously with the filing of the above described tariff sheet, the company shall furnish the Commission, jurisdictional customers, and interested state commissions a report containing detailed computations which clearly show the derivation of the Current Adjustment to be applied to its existing rates. The format in which this report must be submitted and

the information that must be contained in this report are prescribed in FERC Form No. 542-PGA, Purchased Gas Adjustment (PGA) Filing, available at the Commission's Division of Public Information, 825 North Capitol Street, N.E., Washington, D.C. 20426. With its first PGA filing after September 26, 1984, the pipeline shall also furnish the Commission, jurisdictional customers, and interested state commissions and intracompany operating statement for all gas produced by the pipeline, as that term is defined in Part 270 of Subchapter H. Any changes in the intracompany operating statement shall be filed as amendments thereto in the next available PGA filing. In the event the material submitted is deficient, the company will be notified of the deficiencies. No filing date will be assigned until the deficiencies are eliminated.

(vi)(a) Upon the expiration of 36 months after the effective date of the PGA clause, the company shall file a tariff sheet(s) restating its rates to establish a new Base Tariff Rate. The Company shall state its agreement that this filing will automatically be subject to refund concurrently with the filing at the end of 36 months of the tariff sheets establishing a new Base Tariff Rate until an agreement is reached or a Commission determination is made. With this tariff sheet(s) the company shall file a study in the form and with the content prescribed by §154.38 of the Regulations, except Statements O and P, to support the new Base Tariff Rate. (If the Company has a section 5(a) case pending a final order or has made a section 4(e) filing for which the proposed rates would not become effective before termination of the 36-month period, a

study of that proceeding may be utilized.) This study shall be based upon actual costs for the twelve months of most recently available experience, provided that the 12-month period used ends not more than 4 months prior to the expiration of the 36-month period. Annualization for changes which actually occurred in the 12 months will be permitted. This study shall be served on the company's jurisdictional customers and interested State commissions concurrently with the Company's filing with the Commission.

(b) If a section 4(e) case is filed before the expiration of the 36-month period, a new 36-month period will start running when the proposed rates go into effect. Rates determined by the Commission in a section 4(e) or a 5(a) proceeding or rates in a settlement agreement approved by the Commission shall establish the new

Base Tariff Rate when they become effective pursuant to a final order, and a new 36-month period will start running.

(c) If either as a result of conferences a month the company, its jurisdictional customers, interested State commissions, and the Commission staff, or as a result of Commission determination after hearing, it is found, based on the aforementioned study, that the jurisdictional cost of service is less than the jurisdiction revenues collected for the same 12-month period, as adjusted, the company shall restate its Base Tariff Rate, shall file with the Commission a revised tariff sheet(s) reflecting a reduction in its jurisdictional rates by an amount equal to the excess revenues agreed upon or determined, and shall refund to its jurisdictional customers any excess amounts collected subject to refund to the date of

billing under the revised tariff sheets, with interest to that date. This refund obligation shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective from the date of the Commission's final order determining a new Base Tariff Rate.

(vii) The jurisdictional portion of all refunds, including those effected by billing adjustments pursuant to §270.101(e) or §273.302 of this chapter, received from suppliers (including interest received) applicable to purchases after a PGA clause becomes effective must be flowed through to the company's jurisdictional customers. If the company uses deferred accounting for unrecovered purchased gas costs, the jurisdictional portion of all refunds received (including

interest received) must be credited to the unrecovered purchased gas cost account. If the company does not use deferred accounting and holds supplier refunds for more than 30 days, the jurisdictional portion of supplier refunds (including interest received) must be credited to the unrecovered purchased gas cost account. If the company does not use deferred accounting and holds supplier refunds for more than 30 days, the jurisdictional portion of supplier refunds (including interest received) applicable to purchases after a PGA clause becomes effective must be flowed through to the company's jurisdictional customers with interest. The reporting requirements for refunds accomplished through billing adjustments are set forth in §270.101(f) and §273.302(f) of this chapter. An interstate pipeline, not required to make a PGA filing by this

section, that recovered refunds through billing adjustments pursuant to §270.101(e) or §273.302 during a calendar year, must file a refund report for that year by the following March 1 which sets forth all the information required by §270.101(f) and §273.302(f)(2)(i) of this chapter. Any requirement for the serving and filing of other reports, showing details of the computations of any such refunds, must be either as agreed in settlement discussion held among the company, jurisdictional customers, interested State commissions, other interested parties, and the Commission staff, or as prescribed by Commission order.

(viii) Pipelines must file tariff sheets pursuant to this part to conform their existing PGA clause on or before December 1, 1978, which shall become effective as of January 1, 1979. After

January 1, 1979, a pipeline shall not be permitted to track changes in purchased gas costs under a PGA clause unless the PGA clause in effect at that time conforms to the rule promulgated in Order No. 13.

(ix) Election of a PGA clause. A natural gas pipeline company shall elect once every three years whether to recover all changes in purchased gas costs either through general rate filings made under §154.63 or through filings made under a PGA clause prescribed in this paragraph.

(a) Procedure for election. For purposes of this paragraph, "election period" means a three year calendar period commending on January 1, of every third year. The first election period commences on January 1, 1979. The election for an election period must be made on or before the first day of the December preceding the new election period and is binding for

the entire election. Any company which has a PGA clause in its tariff on December 1, 1978, shall be considered to have elected to recover its changes in purchased gas cost exclusively through the PGA clause. However, such a company with a PGA clause in its tariff on December 1, 1978 which chooses not to use the PGA clause must notify the Commission by December 1, 1978 that it has elected not to recover any of its changes in purchased gas cost under a PGA clause. It shall file revised tariff sheets eliminating the PGA clause from its tariff, by December 15, 1978 to become effective January 1, 1979. Waiver of the notice requirements in §154.22 is hereby granted to permit such conforming tariff sheets to become effective January 1, 1979. Any company which elects the PGA clause option pursuant to this paragraph may terminate its

PGA clause effective as of the next election period by filing revised tariff sheets eliminating the PGA clause from its tariff. Such tariff sheets must be filed on or before December 1, preceding a new election period to become effective on the first January 1 of the new election period. If a company does not make such a filing, it shall be considered to have elected to renew its PGA clause option for the new election period. A company which has chosen the non-PGA option for an election period may file revised tariff sheets implementing the PGA clause option for the next election period. such tariff sheets must be filed on or before the December 1 preceding a new election period to make the PGA clause effective on the first January 1 of that election period.

(b) PGA clause option. Any company which has elected the PGA clause option

for the first election period, beginning on January 1, 1979, may not include any changes in purchased gas cost in a general section 4 rate filing made under §154.63 and which is filed in December 1978. Thereafter, during an election period for which a company has elected the PGA option, it shall file for changes in its purchased gas cost exclusively through its PGA clause. The company may not file tariff sheets eliminating its PGA clause from its effective tariff during the election period and may not include any changes in its purchased gas cost in a general section 4 rate filing made under §154.63, during the election period for which the PGA clause is in effect: Provided, however, That a company may request the Commission for a waiver of the election and if granted may include changes in purchased gas cost in a general section 4

rate filing made under §154.63. To receive a waiver, the company must demonstrate that (1) it is unable to arrange for financing of the balances being carried in the deferred account (Account No. 191), or (2) is not able to earn its overall rate of return last allowed by the Commission because of the magnitude of the balances in the deferred account (Account No. 191) and a significant difference between the costs of financing the deferred amounts and the carrying charges allowed under paragraph (d)(r)(iv)(c) of this section.

(c) Non-PGA option. During an election period for which the company has elected the non-PGA option, a company shall file for changes in purchased gas cost exclusively in a general section 4 rate filing made under §154.63. The company may not file tariff sheets to include

a PGA clause in its effective tariff during that election period.

(x) One-time passthrough of certain estimated NGPA costs - (a) General rule. Notwithstanding the provisions of clause (iv)(d) of paragraph (d)(4), any natural gas pipeline company with a PGA clause in effect on January 1, 1979, may estimated its changes in purchased gas cost directly attributable to the Natural Gas Policy Act of 1978 (NGPA) up to and including the month preceding the effective date of its first PGA tariff adjustment effective on or after January 1, 1979, provided however, for those months for which the pipeline has actual NGPA costs reflected in its deferred account, the actual amounts must be used in calculating the surcharge. The amount estimated may be added to the actual amounts reflected in the pipeline's deferred account (Account 191) for pur-

poses of calculating the PGA surcharge included in the pipeline's first PGA rate adjustment to be effective on or after January 1, 1979.

(b) Option for pipelines with a PGA rate adjustment effective on January 1, 1979. Those pipelines with PGA rate adjustments to become effective on January 1, 1979 may elect to include the adjustment for NGPA costs prescribed in clause (x)(a) either (i) in their PGA rate adjustment to become effective January 1, 1979, or (ii) in their first PGA rate adjustment filed on or after January 1, 1979. Those pipelines choosing (i) must file amended PGA rate sheets which reflect the adjustment allowed in clause (x)(a) no later than December 15, 1978; the notice requirements of §154.138(d)(4)(v) and the notice provisions in the pipeline's PGA clause tariff provisions are hereby waived

for such PGA tariff filings made during December 1978.

-- Footnotes --

1/ For the purpose of this paragraph, purchased gas costs represent the cost of wellhead purchases, field line purchases, plant outlet purchases, transmission line purchases, and pipeline or affiliate production that qualifies for and is being afforded an area of nationwide rate under §2.66 of this chapter, a maximum lawful price under §270.203 of this chapter, or a rate specified under §154.42(b). Nonconcurrent exchange transactions may be reflected as a cost of purchased gas. If a company has underground storage, the cost of purchased gas included in Accounts 800, 801, 802, and 803, and where applicable, Account 806, shall be debited or credited to reflect the net injections or withdrawals from underground storage. This adjustment shall be prorated between pipeline supplies (contractual daily delivery obligations) and liquified natural gas, synthetic natural gas, gas from coal gasification, and pipeline production when priced on a cost of service basis pursuant to Commission authorization shall not be reflected in a PGA clause without prior Commission approval.

2/ The base tariff rate is the effective rate on file with the Commission excluding adjustments effected pursuant to a PGA clause.

§154.63 Changes in a tariff, executed service agreement or part thereof.1/

(a) Definitions-(1) Changes other than in rate level. Rate filings for changes other than in rate level include inter alia changes in service agreements (changed contract demand, new delivery points, etc.), tariff provisions (changed penalty provisions, changed delivery pressures, etc.), rate form (where no change in revenue is contemplated).

(2) Major rate increase. (i) Rate changes that will result in a general increase in revenues for the stated purpose of obtaining a fair rate of return on jurisdictional sales,

(ii) Rate changes that extend to all, or substantially all, of the jurisdictional sales, or

(iii) Rate changes associated with

the delivery of substantially changed volumes of gas to existing customers.

(3) Minor rate increase. Minor rate increases usually relate to a few schedules and are designed to bring such schedules into harmony with general tariff policy, to eliminate inequities and to achieve other formal adjustments, in cases where any increase in revenue is subordinate to some other purpose. They include changes that are not designed to provide general revenue increases such as to offset increased cost or otherwise achieve a fair return on the overall jurisdictional business. For the purpose of compliance with this subchapter, proposed increases in rates or charges which, for the test period, do not exceed the smaller of $100,000 or 5 percent, of the revenues under the jurisdiction of the Commission shall be considered minor.

(4) Rate decrease. Changes in rate level no part of which directly or indirectly result in any increased charge to a customer or class of customers will be considered as a rate increase.

(b) Material to be submitted-(1) All filings. With the filing of any tariff, executed service agreement or part thereof which changes or supersedes any tariff, contract or part thereof on file with the Commission, there shall be included the following:

(i) A letter of transmittal containing a list of the material enclosed, the date on which such filing is proposed to become effective, the docket number, if any, of the proceeding in which the change was authorized and a list of the names and addresses of the purchasers and State Commissions to whom it has been mailed.

(ii) A statement of the nature, the reasons, and the basis for the proposed change.

(iii) A fee in the amount prescribed in Part 381 of this chapter, unless a petition for waiver is submitted in lieu thereof under §381.106 of this chapter.

(2) Changes other than in rate level. In addition to the material required by paragraph (b)(1) of this section there shall be submitted a comparative statement of sales made, or transportation, exchange, etc., performed, and revenues therefrom, by months and in total, under the present and proposed tariff, contract, or part thereof, setting forth the transactions for the twelve months immediately preceding and for the twelve months immediately succeeding the proposed effective date of the change in tariff, contract, or part thereof. Actual data shall

be used as far as possible, and any estimated data shall be designated as such. The statements shall be subdivided by rate schedules, classes of service, customers, and delivery point when more than one is involved. In the event any sale shown separately is made through more than one delivery point, and conjunctive billing is provided by the tariff, the above data may be combined for all delivery points. Such data shall include billing quantities that are used to compute the charges including contract demands, billing demands, metered demands and volumes, heat content, rates and other determinants, in sufficient detail to permit complete verification of the revenues.

(3) Major rate increase. Major natural gas companies (as defined in subchapter F, Part 201, Uniform System of Accounts Prescribed for Natural Gas Com-

panies Subject to the Provisions of the Natural Gas Act of this chapter) shall submit, in addition to the material required by paragraph (b)(1) of this section, Statements A to M inclusive and O and P described in paragraph (f) of this section. Nonmajor companies, defined above, shall file only Statements L, M, N, O, and P. Statement P, which is required to be submitted by all classes of companies, may be furnished not later than 15 days after the date of the filing. A natural gas company filing another major increase in rates or charges within a period of twelve months after the date of filing of Statements A through M and O and P or after the end of the test period used therein including the period of adjustments shown on Statements A through M may submit for such other increase Statements L, M, and N in lieu of Statements A

through M if the proposed new rate increase is filed to compensate only for an increase in the cost of purchased gas and there has been no material change in the company's facilities, sales volumes, and cost of service other than cost of purchased gas since such prior rate increase was filed. However, pipelines with Commission approved PGA clauses conforming to §154.38(d)(4) shall not be permitted to include changes in purchased gas cost in filings made under this subparagraph unless they have received a waiver of their PGA election under §154.38(d)(4). A pipeline with an effective Commission approved PGA clauses shall reflect in any filing made pursuant to this paragraph the total system weighted average current unit cost of purchased gas reflected in the pipeline's latest effective PGA rate adjustment, unless the pipeline has received a

waiver of its PGA election under §154.38(d)(4).

(4) Minor rate increase, rate decrease and changes in cost of service tariff. Only Statement L through N need be filed in addition to the material required by paragraph (b)(1) of this section. (Statements L through N are not required to make effective rate changes or tariff provisions ordered by the Commission.) A pipeline with an effective Commission approved PGA clause conforming to §154.38(d)(4) shall not be permitted to include changes in purchased gas costs in rate filings made pursuant to this subparagraph unless the pipeline has received a waiver of its PGA election under §154.38(d)(4). A pipeline with an effective Commission approved PGA clause shall reflect in any filing made under this subparagraph the total system weighted aver-

age current unit cost of purchased gas reflected in the pipeline's latest effective PGA rate adjustment, unless the pipeline has received a waiver of its PGA election under §154.38(d)(4). However, the pipeline may adjust the purchased gas volumes.

(c) Submission and rejection-(1) Submission of material by reference. If all or any portion of the information called for by this section has already been submitted to the Commission or is included among the data filed pursuant to this section, specific reference thereto may be made in lieu of resubmission in response to these requirements. Copies of material submitted by reference shall be made available to the staff and six additional copies thereof shall be furnished to the Director, Division of Gas Pipeline Rates (Office of Pipeline and Producer Regula-

tion) to be available to interveners according to their needs, after their intervention has been permitted by the Commission.

(2) Item by reference for major rate increase. In addition to the material required to be submitted pursuant to paragraph (b)(3) of this section, the last FERC Form No. 2 of the natural gas company on file with the Commission shall be made an item by reference. In the event an FERC Form No. 2 for a later calendar year would otherwise be required to be filed with the Commission within 60 days from the end of the base period selected by the natural gas company for its rates increase filing, said FERC Form No. 2 shall be filed concurrently with the rate increase. There shall be furnished to the Director, Division of Gas Pipeline Rates (Office of Pipeline and Producer Regulation) with the

rate increase filing, one copy of the FERC Form No. 2 to be available to staff and six additional copies to be available to interveners according to their needs after intervention has been approved by the Commission.

(3) Reliance on other data. If the natural gas company has relied on data other than those in Statements A through P in support of its rate increase, such other data, appropriately identified and designated as such and separately stated, shall be submitted in addition to the data required by Statements A to P, in accordance with the requirements of paragraphs (d) and (e) of this section and limited to the test period prescribed in paragraph (e)(2) of this section. Where such other data fails to comply with the requirements herein prescribed, it shall be subject to rejection and if not properly refiled at

lead 15 days prior to the effective date proposed for the rate filing it may not thereafter be introduced in evidence in the event the proposed rate filing is set for hearing.

(4) Rejection for noncompliance. Where the data submitted in compliance with paragraph (b) of this section do not comply with the requirements of the rules and regulations, the rate filing is subject to rejection.

(d) Form and number of copies-(1) Changes other than in rate level. Filings for changes other than in rate level shall comply with §154.26.

(2) Change in executed service agreement. Agreements intended to effect a change or revision of an executed service agreement shall be in the form of a superseding executed service agreement only. Service agreements shall not con-

tain any supplements, but may contain exhibits (stating contract demand, delivery points, delivery pressures, names of industrial customers of the distributor-customer, names of distributors with one named as agent where delivery to several distributors is effected at the same delivery point and well names) which may be separately superseded.

(3) Rate changes. Ten sets of the statements and of the additional information, if any, shall be submitted, each set securely bound in a cover.

(4) Format of statements and schedules. Amounts purporting to represent book data included in statements and schedules required to be prepared or submitted as part of the filing shall be reported in a separate column or columns. All adjustments to book amounts shall also be reported in a separate column or

columns so that book amounts, adjustments thereto and adjusted amounts will be clearly disclosed.

(e) Scope and composition of material for major increase-(1) Preparation for hearing. A natural gas company filing for an increase in rates or charges shall be prepared to go forward at a hearing on reasonable notice on the data which have been submitted and sustain the burden of proof imposed by the Natural Gas Act of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential. The Commission is desirous of avoiding delay in processing rate filings. To this end, the material relied on in the filing and supporting work papers should be of such composition, scope, and format that it could serve as the company's complete case-in-chief in the event the rate is suspended

and the matter is set for hearing to commence on a date within six months from the date of filing. If the rate fixing adjustments presented are not in full accord with a prior Commission decision directly involving the filing company, the company shall include in its working papers alternate material which will reflect the effect of such prior decision. (For purpose of this provision, rate of return is not a rate fixing adjustment.)

(2) Base and test periods. (i) If the natural gas company has been in operation for 12 months at the time of the filing, the Statements A to M, inclusive, and O and P or, L through N inclusive, as appropriate, and supporting schedules, shall be based upon a test period which shall consist of a base period of 12 consecutive months of most recently available actual experience, adjusted for changes in

revenues and costs which are known and are measurable with reasonable accuracy at the time of the filing, and which will become effective within nine months after the last month of available actual experience utilized in the filing, but in no event shall such test period extend more than nine months beyond the date of filing; Provided, however, That, for good cause shown, upon application of the natural gas company made to the Commission 30 days in advance of the rate filing, the Commission may allow reasonable deviation from the prescribed test period; Provided further, That the last day of the 12 months of actual experience shall not be more than four months prior to the date of filing the proposed changes in rates and charges. The 12 months of experience shall be adjusted to eliminate nonrecurring items (except minor amounts), but this shall not

preclude the filing company from including items which, on the basis of existing facts, it can show will be experienced or from including an appropriate normalizing adjustment, e.g., rate case expenses, in lieu of a nonrecurring item. If the natural gas company has had less than 12 months' experience, the test period may consist of 12 consecutive months ending not more than one year from filing date, provided, however, the adjustments are not included for occurrences anticipated after the one-year period. The Commission may allow reasonable deviation from the prescribed test period; also, deviation will be allowed when the filing company proposes to support the changed rate levels with actual expense for a 12 month base period adjusted only for annualization and normalization of those actual costs.

(ii) Adjustments to experience, or estimates where 12 months' experience is not available, may include the amounts for facilities for which a permanent or temporary certificate has been granted, provided such facilities will be in service within the test period, but such adjustments or estimates shall not include any amounts for facilities in respect to which a certificate of public convenience and necessity must be obtained but which has not been issued at the date of filing, nor shall adjustments or estimates include any amounts for other facilities associated therewith. The bases and procedures, including the docket number of each such outstanding certificate and other significant data, used in the derivation of adjustments or estimates shall be submitted in sufficient detail on supporting sched-

ules as to permit ready analysis of such adjustments or estimates.

(3) Joint facilities. If the natural gas company operates other departments in addition to the natural gas operations involved in the subject rate increase and has allocated to such natural gas operations any of its investment in joint or other department facilities and the operation, maintenance, depreciation costs or taxes associated therewith, it shall be shown on the statements required to be filed by this section, or the schedules in support thereof, the amounts so allocated together with the methods used in making such allocations: Provided That if such allocations are recorded in the natural gas company's books on the basis of current accounting procedures the submittal may be confined to a brief description of the methods followed.

-- Footnotes --

1/ The provisions of this section shall not be applicable to filings made pursuant to §§154.81 through 154.86, unless such filing results in a change in rate, charge, classification or service.

§270.203 Pipeline, distributor and affiliate production.

(a) Attribution rule for pipelines and distributors. For purposes of applying section 2(21)(B) of the NGPA, a sale by a pipeline or distributor is a sale of natural gas attributable to volumes of natural gas prcduced by such pipeline or distributor to the extent that such sale is comprised exclusively of production volumes of natural gas from identifiable wells, properties, or reservoirs which are owned by such pipeline or distributor.

(b) Circumvention rule for pipelines and distributors. In order to prevent circumvention of the maximum lawful prices established under Title I of the NGPA, the

term "first sale" includes any sale by a pipeline or distributor which is comprised of production volumes from identifiable wells, properties, or reservoirs if a portion of those volumes is produced from wells, properties, or reservoirs owned by such pipeline or distributor unless:

(1) The price at which such natural gas is sold is regulated pursuant to the Natural Gas Act or is regulated by a State agency empowered by State statute to establish, modify or set aside the rate for such sale; or

(2) The Commission, on application, has determined not to treat such sale as a first sale.

(c) Sales by certain affiliates. Any sale by an affiliate of a pipeline or distributor is a first sale if such affiliate is not itself a pipeline or distributor, unless the Commission, on application, has

determined not to treat such sale as a first sale. For purposes of this paragraph, the term "sale" does not include any transaction between an interstate pipeline and an affiliate thereof if such transaction would not have been treated as a sale for purposes of the Natural Gas Act.

(d) Reports. A pipeline, distributor or affiliate thereof must file a report with this Commission every 6 months showing the price charged in a sale which was excluded from first sale treatment under paragraph (b)(2) or (c) of this section. Any determination under paragraph (b)(2) or (c) may be revoked by the Commission on the basis of information in such reports or on the basis of other information.

(e) Definitions. For the purposes of this section:

(1) "Pipeline or distributor" means an interstate pipeline, an intrastate pipeline, or a local distribution company.

(2) "State agency" means a State, a political subdivision of a State, or an agency or instrumentality of either.

(Natural Gas Policy Act of 1978, 15 U.S.C. 3301 et seq.; Natural Gas Act, as amended, 15 U.S.C 717 et seq.; Department of Energy Organization Act, 42 U.S.C. 7107 et seq.; E.O. 12009, 42 FR 46267)

[Order 58, 44 FR 66580, Nov. 20, 1979].

§154.42 Pricing of certain gas produced on or after December 1, 1978, by pipelines and pipeline affiliates.

(a) Applicability. This section applies to natural gas that is produced by an interstate pipeline or an affiliate thereof and that is delivered to such pipeline, other than in a first sale, if:

(1) Such gas is produced on or after November 15, 1979; or

(2) Such gas is produced on or after December 1, 1978, and before November 15, 1979, and

(i) Is specifically made subject by Commission order to the outcome of the proceeding in which this section has been promulgated; or

(ii) Such pipeline's or affiliate's filing for cost-of-service treatment for such gas was denied by the Commission under §2.66(a)(4) of this chapter after December 1, 1978, for failure to show special circumstances justifying such treatment.

(b) NGPA rate treatment. (1) General rule. Natural gas to which this section applies and for which NGPA rate treatment is available under paragraph (b)(2) of this section shall be priced for ratemak-

ing purposes in any pipeline rate proceeding at the lower of:

(i) The rate that would have been applicable under Part 271, under Part 272, or under Part 273 of Subchapter H had the gas been delivered to the pipeline in a first sale; or

(ii) The amount paid in comparable sales (which may also be first sales) between persons not affiliated with such interstate pipeline or with each other.

(2) Gas for which NGPA rate treatment is available. (i) For purposes of this section, NGPA rate treatment is available (except as provided in paragraph (b)(2)(ii) of this section) for natural gas if the production is from a lease owned by a pipeline or affiliate thereof and if:

(A) The lease was acquired after October 7, 1969; or

(B) The natural gas is produced from a well commenced on or after January 1, 1973; or

(C) The natural gas is produced through a well commenced prior to January 1, 1973, as a result of a completion operation commenced on or after such date into a difference, formerly nonproductive reservoir; or

(D) The Commission, prior to December 1, 1978, had granted area or nationwide rate treatment for such gas in lieu of otherwise applicable cost-of-service treatment; except that NGPA rate treatment shall be available only for natural gas produced during the period for which area or nationwide rate treatment was provided in applicable Commission orders and shall also be subject to the conditions specified in such orders.

(ii) Exclusion from NGPA rate treatment. NGA rate treatment is not available for natural gas produced from leases acquired before November 15, 1979, which have ever been granted cost-of-service treatment pursuant to §2.66(a)(4) of this chapter or pursuant to a settlement approved by the Commission in lieu of a finding of special circumstances under that section; except that, in the case of natural gas from leases which have been granted area or nationwide rates for some specified percentage, NGPA rate treatment is available for that specified percentage.

(3) Subchapter H requirements. A pipeline or affiliate that produced natural gas for which NGPA rate treatment is available under paragraph (b)(2) of this section shall be subject to all the requirements of Subchapter H that would have

been applicable had the natural gas been delivered pursuant to a first sale other than the requirement of §270.101(d)(1) regarding applicable filing requirements under §154.92 and §154.94. Such pipeline or affiliate may apply for a waiver of any time-of-filing requirement in Subchapter H based on a showing that a timely filing was not made because such pipeline or affiliate had no notice that it was subject to such requirement under this subparagraph.

(c) Cost-of- service treatment. In any pipeline rate proceeding, natural gas to which this section applies and for which NGPA rate treatment is not available shall be priced for rate-making purposes on a cost-of-service basis.

(d) Definitions. For purposes of this section:

(1) NGPA definitions. The terms "interstate pipeline," "affiliate," and "first sale" have the same meaning as they have for purposes of Subchapter H.

(2) Lease. The term "lease" includes any fee interest in producing property or any working interest in production.

(3) Pipeline rate proceeding. The term "pipeline rate proceeding" includes a proceeding under §154.38(d)(4).

(Natural Gas Policy Act of 1978, 15 U.S.C. 3301 et seq.; Natural Gas Act, as amended, 15 U.S.C. 717 et seq.; Department of Energy Organization Act, 42 U.S.C. 7107 et seq.; E.O. 12009, 42 FR 46267)

[Order 98, 45 FR 53098, Aug. 11, 1980, as amended by Order 102, 45 FR 67091, Oct. 9, 1980]

§154.42 Pricing of gas produced on or after December 1, 1978, by pipelines and pipeline affiliates.

(a) Applicability. This section applies to natural gas that is produced by an interstate pipeline or an affiliate thereof and that is delivered to such pipeline or affiliate in a first sale on or after December 1, 1978.

(b) General rule. Except as provided in paragraph (c) of this section, natural gas to which this section applies shall be priced at a rate not to exceed the lower of:

(1) The applicable rate under Part 271 or Part 272 of Subchapter H; or

(2) The amount paid in comparable sales between persons not affiliated with such interstate pipeline, affiliate, or each other.

(c) Cost-of-service treatment. A pipeline that has been permitted to price

its production on a cost-of-service basis may price natural gas to which this section applies on a cost-of-service basis for ratemaking purposes in any pipeline rate proceeding. The Commission will review such a price if it exceeds the maximum lawful price that would otherwise apply to the first sale of such gas at the wellhead under Part 271 or Part 272 of Subchapter H.

(d) Subchapter H requirements. A pipeline or affiliate that produces natural gas for which the maximum lawful price under Part 271 or Part 272 of Subchapter H is available under paragraph (b) of this section shall be subject to all the requirements of Subchapter H including the requirement of §270.101(d)(1) regarding applicable filing requirements under §§154.92 and 154.94. Such pipeline or affiliate may apply for a waiver of any

time-of-filing requirement in Subchapter H.

(e) Definitions. For purposes of this section:

(1) NGPA definitions. The terms "interstate pipeline," "affiliate," "first sale," and "intracompany operating statement" have the same meaning for this section as they have for Subchapter H.

(2) Pipeline rate proceeding. The term "pipeline rate proceeding" includes a proceeding under §154.38(d)(4).

PART 201 -- UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR NATURAL GAS COMPANIES SUBJECT TO THE PROVISIONS OF THE NATURAL GAS ACT (CLASS A AND CLASS B)

* * * * *

B. NATURAL GAS PRODUCTION

B 1. Natural Gas Production and Gathering

Operation

750 Operation supervision and engineering.

This account shall include the cost of labor and expenses incurred in the general supervision and direction of the operation of production and gathering systems. Direct supervision of specific activities such as turning on and shutting off wells, operating measuring and regulating stations, etc., shall be charged to the appropriate account. (See operating expense instruction 1.)

* * * * *

751 Production maps and records.

This account shall include the cost of labor, materials used and expenses incurred in the preparation and maintenance of production maps and records.

* * * * *

752 Gas wells expenses.

This account shall include the cost

of labor, materials used and expenses incurred in operating producing gas wells.

* * * * *

753 Field lines expenses.

This account shall include the cost of labor, materials used and expenses incurred in operating field lines.

* * * * *

754 Field compressor station expenses.

This account shall include the cost of labor, materials used, except fuel, and expenses incurred in operating field compressor stations.

* * * * *

755 Field compressor station fuel and power.

A. This account shall include the cost of gas, coal, oil, or other fuel, or electricity, used for the operation of field compressor stations, including applicable amounts of fuel stock expenses.

B. Records shall be maintained to show the quantity of each type of fuel consumed or electricity used at each compressor station, and the cost of such fuel or power. Respective amounts of fuel stock and fuel stock expenses shall be readily available.

* * * * *

756 Field measuring and regulating station expenses.

This account shall include the cost of labor, materials used and expenses incurred in operating field measuring and regulating stations.

* * * * *

757 Purification expenses.

This account shall include the cost of labor, materials used and expenses incurred in operating equipment used for purifying, dehydrating, and conditioning of natural gas.

* * * * *

758 Gas well royalties.

A. This account shall include royalties paid for natural gas produced by the utility from wells on land owned by others.

B. Records supporting the entries to this account shall be so kept that the utility can furnish the name of the parties to each contract involving royalties, the terms of each contract, the location of the property involved, the method of determining the royalties, and the amounts payable.

759 Other expenses.

This account shall include the cost of labor, materials used and expenses incurred in producing and gathering natural gas and not includible in any of the foregoing accounts.

* * * * *

760 Rents.

This account shall include rents for property of others used, occupied or operated in connection with the production and gathering of natural gas, other than rentals on land and land rights held for the supply of natural gas. (See operating expense instruction 3.)

* * * * *

761 Maintenance supervision and engineering.

This account shall include the cost of labor, materials used and expenses incurred in the general supervision and direction of maintenance of the production and gathering facilities as a whole. Direct field supervision of specific jobs shall be charged to the appropriate maintenance account. (See operating expense instruction 1.)

762 Maintenance of structures and improvements.

This account shall include the cost of labor, materials used and expenses incurred in the maintenance of structures and improvements, the book cost of which is includible in accounts 326, Gas Well Structures, 327, Field Compressor Station Structures, 328, Field Measuring and Regulating Station Structures, and 329, Other Structures. (See operating expense instruction 2.)

763 Maintenance of producing gas wells.

This account shall include the cost of labor, materials used and expenses incurred in maintenance of gas wells and equipment includible in accounts 330. Producing Gas Wells--Well Construction, and 331, Producing Gas Wells--Well Equipment. (See operating expense instruction 2.)

764 Maintenance of field lines.

This account shall include the cost of labor, materials used and expenses incurred in maintenance of field lines the book cost of which is includible in account 332, Field Lines. (See operating expense instruction 2.)

* * * * *

765 Maintenance of field compressor station equipment.

This account shall include the cost of labor and expenses incurred in the maintenance of field compressor station equipment includible in account 333, Field Compressor Station Equipment. (See operating expense instruction 2.)

766 Maintenance of field measuring and regulating station equipment.

This account shall include the cost of labor, materials used and expenses incurred in maintenance of field measuring and regulating station equipment includible in account 334, Field Measuring and

Regulating Station Equipment. (See operating expense instruction 2.)

767 Maintenance of purification equipment.

* * * * *

768 Maintenance of drilling and cleaning equipment.

This account shall include the cost of labor, materials used and expenses incurred in the maintenance of drilling and cleaning equipment includible in account 335, Drilling and Cleaning Equipment, except such costs of maintaining drilling tools or other equipment which are assignable to the cost of drilling wells. (See operating expense instruction 2.)

769 Maintenance of other equipment.

This account shall include the cost of labor, materials used and expenses incurred in maintenance of other production and gathering equipment includible in ac-

count 337, Other Equipment. (See operating expense instruction 2.)

(Natural Gas Act, 15 U.S.C. 717-717-w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432 (1982); Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E. O. 12009, 3 CFR Part 142 (1978))
[Order 391, 49 FR 33858, Aug. 27, 1984]

February 20, 1981

Mr. Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: National Fuel Gas Supply Corporation, Docket Nos. RP80-95, TA80-1-16 (PGA80-2 & IPR80-2), TA80-2-16 (PGA80-3 & IPR80-3), and TA81-1-16-001 (PGA81-1 & IPR81-1): Settlement Agreement and Termination of Proceeding

Dear Mr. Plumb:

National Fuel Gas Supply Corporation ("National Fuel"), pursuant to Section 1.18(e) of the Commission's Rules and Regulations, hereby submits as an offer of

settlement an original and 14 conformed copies of the following documents:

1. Stipulation and Agreement

2. Explanatory Statement.

3. List of all filings and documents in support of the settlement.

4. A proposed order of the Commission accepting the settlement including the waiver of such procedural rules as would be required to implement the settlement.

The terms of the Stipulation and Agreement were arrived at during settlement negotiations held on January 15, 1981, between National Fuel, the Public Service Commission for the State of New York ("New York"), and the Commission Staff. The settlement disposes of all the issues in this proceeding and provides for the termination of Docket Nos. TA80-1-16 (PGA80-2 & IPR80-2), TA80-2-16 (PGA80-3 & IPR80-3) and TA81-1-16-001 (PGA81-1 &

IPR81-1). National Fuel submits that this settlement is just and reasonable and therefore in the public interest.

The settlement is supported by New York and the Commission Staff. National Fuel is authorized to state that the other parties are not opposed to the settlement.

By this letter, National Fuel requests that Presiding Administrative Law Judge Daniel M. Head certify the settlement to the Commission for its approval.

A copy of this letter and the enclosed offer of settlement is contemporaneously being served on the Commission Staff and all parties to the proceeding. Said persons are being notified that the enclosed offer of settlement is being filed with the Commission on February 19, 1981. Therefore, in accordance with Section 1.18(e)(2) of the Commission's Rules of Practice and Procedure, comments on the

offer of settlement are to be filed on March 11, 1981. However, since this is an uncontested offer of settlement, the parties, including the Commission Staff, have authorized counsel for National Fuel to request that initial comments be filed on March 6, 1981, and to represent that they waive their rights to file reply comments.

Very truly yours,

John T. Ketcham
George L. Weber
Attorneys for
National Fuel Gas
Supply Corporation

Enclosures

cc: Mr. Dennis Melvin, Esquire
Commission Staff Counsel

Public Service Commission for
the State of New York

UGI Corporation

People's Natural Gas Company

PRIVILEGED PURSUANT TO THE FEDERAL ENERGY REGULATORY COMMISSION'S RULES OF PRACTICE AND PROCEDURE 18 CFR §1.18(e) and §1.33(c)(16)(iv)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of	)	Docket Nos.
	)	RP80-95
National Fuel Gas	)	TA80-1-16
Supply Corporation	)	(PGA80-2 &
	)	IPR80-2)
	)	TA80-2-16
	)	(PGA80-3 &
	)	IPR80-3)
	)	TA81-1-16-001
	)	(PGA81-1 &
	)	IPR81-1)

STIPULATION AND AGREEMENT

This Stipulation and Agreement is intended to provide for the resolution of all issues now pending before the Commission in the rate proceeding of National Fuel Gas Supply Corporation ("National Fuel") in Docket Nos. RP80-95, TA80-1-16 (PGA80-2 & IPR80-2), TA80-2-16 (PGA80-3 & IPR80-3), and TA81-1-16-001 (PGA81-1 & IPR81-1).

Introduction

National Fuel filed with the Federal Energy Regulatory Commission ("Commission") on April 30, 1980, a rate filing pursuant to Section 4 of the Natural Gas Act, 15 U.S.C. §717, et seq. and Section 154 of the Commission's Rules and Regulations ("Regulations"). Such filing provided for an increase in jurisdictional revenues by approximately $18 million annually, based on the 12-month period ended December 31, 1979, as adjusted. By order issued May 30, 1980, the Commission accepted National Fuel's filing, provided for public hearing, and suspended the tariff sheets until November 1, 1980, subject to refund.

On September 19, 1980, the Commission Staff filed its top sheets and a prehearing conference was held on October 3, 1980. Subsequent thereto, the parties met

to discuss settlement. As a result of such conferences, the parties have reached a settlement agreement as hereinafter set forth.

ARTICLE I

Settlement Cost of Service, Settlement Rates and Settlement Sales Volumes

Subject to the terms, conditions and limitations of this Stipulation and Agreement, the jurisdictional cost of service, sales volumes, jurisdictional revenues, and resulting unit rates are agreed to as fair and reasonable and in the public interest for purposes of implementing this Stipulation and Agreement. The settlement cost of service is set forth in Appendix A. The settlement base tariff rates are set forth in Appendix B.

ARTICLE II

Sales Refund Obligation

Section 1. The rates set forth in Appendix B are based on an annual jurisdictional sales volume of 175,000,000 Mcf.

Section 2. If the actual volume of sales for the twelve months ending October 31, 1981, or any subsequent twelve-month period ending on October 31 during the term of this agreement, to the sales customers reflected in the billing determinants in Appendix B, exceed 175,000,000 Mcf, National Fuel agrees to refund with interest to its jurisdictional sales customers, under the rate schedules set forth in Appendix B, an amount to be determined by multiplying such excess sales volumes by 28.98 cents per Mcf, which represents the fixed cost component of the base tariff commodity rates, reduced by the credit, if any, determined in accordance with Section 3 hereof.

Section 3. Potential refunds to such customers, computed in Section 2 above, shall be reduced by a dollar credit equal to the amount, if any, by which the actual cost of service exceeds the settlement cost of service set forth in Appendix A hereof, but shall exclude purchased gas, transportation, and other costs which are trackable under National Fuel's tariff of this Stipulation and Agreement. The actual cost of service determination for the twelve months ending October 31, 1981, or for any twelve-month period ending on October 31, 1981, or for any twelve-month period ending on October 31 of a succeeding year, shall be developed in accordance with the same principles and procedures used to develop the settlement cost of service set forth in Appendix A, and shall reflect the actual costs for the respective period per books except as provided

in Appendix A, Schedule 9, and excluding major out-of-period items. The determination of the actual cost of service offset shall include a total rate of return allowance of 10.55% and using the same weighted costs of long-term debt, preferred stock and common equity, as set forth in Appendix A, Schedule 10, applied to the actual average rate base for the respective period.

Section 4. If the final refund period is less than twelve months as a result of the termination of this Stipulation and Agreement in accordance with Article XI hereof, the potential refunds, if any, pursuant to this Article II for any such refund period shall be determined by multiplying (1) the refunds which would have been determined for the full twelve-month period beginning with the preceding November 1 and ending on October 31 following

termination of this Stipulation and Agreement in accordance with the preceding conditions of this Article II, by (2) the ratio of the total actual sales volumes during the partial period to the total actual sales volumes during the full twelve-month period. The offsets for the partial period will be computed by multiplying (1) the amount by which the actual cost of service for the full twelve-month period beginning on the preceding November 1 and ending on October 31 following termination of this Stipulation and Agreement exceeds the settlement cost of service, using methodology set forth above by (2) the ratio of the total actual sales volumes during the partial period to the total actual sales volumes during the full twelve-month period.

Section 5. If, after applying the credit provided in Section 3 hereof, re-

funds are due as a result of this Article for any period, such refunds shall be made to those jurisdictional sales customers under the rate schedules set forth in Appendix B hereof according to the ratio that their actual purchases from National Fuel during each such period bears to total actual sales by National Fuel during each such period. Refunds will be made within ninety (90) days from the end of each twelve-month period with interest as prescribed by Section 154.67 from the end of each twelve-month period.

Section 6. National Fuel shall file a report of any refund with the Commission, and serve a copy thereof on its customers and interested state commissions. The report shall set forth in detail the data and computations of the determination of the actual cost of service, the sales data and computations supporting the re-

fund amount, and data supporting the distribution of the refunds covered by such report.

Section 7. Nothing in this Stipulation and Agreement either diminishes or enlarges National Fuel's obligations under any of its prior settlement agreements relating to gas sold or transported prior to November 1, 1980.

ARTICLE III

Rate Adjustments and Refunds

A. Rate Adjustments

Section 1. Within thirty (30) days after the date upon which the Commission's order approving this Stipulation and Agreement becomes final and nonappealable, National Fuel shall file revised tariff sheets with the Commission reflecting the rates set forth in Appendix B attached hereto to be effective as of November 1, 1980.

Section 2. The rates provided in Section 1, above, as changed from time to time pursuant to National Fuel's FERC Gas Tariff and this Stipulation and Agreement, shall remain in effect until the termination of this Stipulation and Agreement pursuant to Article XII hereof.

Section 3. All revised tariff sheets filed by National Fuel pursuant to this Part A shall be filed subject to the terms, conditions, and reservations set forth in this Stipulation and Agreement.

B. Refunds

Within thirty (30) days after the date upon which National Fuel shall first begin to charge the rates provided for in Appendix B hereto, National Fuel shall refund to its jurisdictional customers, for the period commencing November 1, 1980, to the date upon which National Fuel shall first begin to charge such rates, the dif-

ference between the amounts collected under the rates in effect subject to refund during such period and the amounts calculated at the rates set forth in Appendix B adjusted to reflect rate changes in accordance with Section A of this Article III. Refunds pursuant to this Section B shall be calculated by customers by rate schedule and shall include interest at the rate prescribed by Section 154.67 1/ of the Commission's Regulations from the date

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1/ In the event the interest rate prescribed by the Commission in Section 154.67 of the Commission's regulations is modified or set aside by the Court in Case No. 79-3698 before the 5th Circuit Court of Appeals subsequent to the date refunds plus interest are made under this Article, National Fuel shall have the right to adjust, in accordance with the Commission's final regulations relating to the appropriate periods involved, the interest paid pursuant to this Stipulation and Agreement by either crediting or debiting the unrecovered purchased gas costs account.

of receipt of payment by National Fuel until the date refund checks are placed in the mail.

ARTICLE IV

Transportation Revenues

National Fuel will credit Account No. 191 by the amount received by National Fuel for transportation services rendered for others from and after November 1, 1980, under existing agreements (excluding (i) revenues received for transportation of gas pursuant to Part 284 of the Commission's regulations promulgated under the Natural Gas Policy Act of 1978, (ii) revenues received for transportation of gas pursuant to National Fuel's Transportation Rate Schedules set forth on Appendix C, and (iii) revenues related to services, other than existing transportation agreements under Part 284 of the Commission's regulations, reflected in credits to the

settlement cost of service) less incremental costs incurred by National Fuel in connection with any such transportation service, provided the Staff or any interested party may contest the reasonableness of any such incremental cost claimed by National Fuel. As of the date this Stipulation and Agreement becomes effective as prescribed in Article XI hereof, National Fuel shall credit to Account 191 any such amounts received prior to said effective date with interest, as prescribed by Section 154.67 of the Commission's regulations, from the date of receipt of such revenues to said effective date and thereafter will credit Account No. 191 by any such amounts on the first day of the month following the month in which the transportation revenues are received by National Fuel for such transportation services rendered for others. For the transporta-

tion of gas for others on and after November 1, 1980, pursuant to existing transportation agreements under Part 284 of the Commission's regulations, National Fuel shall credit Account No. 191 in the same manner by the amount received for such transportation less one cent per Mcf or such higher incremental costs as National Fuel may demonstrate by an appropriate filing to the Commission. Revenues received by National Fuel for the transportation of gas for others pursuant to future transportation agreements will be credited to Account No. 191 to the extent and in the manner provided in the first sentence of this Article unless different treatment is specifically authorized in specific orders approving such transportation services or unless Commission orders of general applicability provide otherwise.

ARTICLE V

Transportation Cost Tracker

Section 1. The purpose of this Article V is to provide a mechanism by which changes in the costs paid to others for transportation arrangements can be reflected in National Fuel's jurisdictional rates.

Section 2. From time to time National Fuel may file and place into effect, subject to suspension for not more than one day, changes in its jurisdictional rates to reflect any increase, and shall file and place into effect, subject to suspension for not more than one day, changes in its jurisdictional rates to reflect any decrease, in the cost to National Fuel under agreements for the transportation of gas by others from the $12,274,071 or 7.01¢ per Mcf contained in the settlement cost of service in Appendix

A, in accordance with the following procedure: 2/

(a) Filings to reflect current Transportation Unit Cost and Transportation Surcharge Adjustments shall be made to be effective on February 1 and August 1 of each year.

(b) Transportation Costs shall include all charges payable to others for transporting, handling, compressing, metering, or related services, whether stated separately or together and whether payable in cash or in kind.

(c) The Current Unit Transportation Cost shall be computed by dividing (i) the

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2/ As used herein, the term "transportation of gas by others" includes any arrangement, whether designated as transportation, exchange, or otherwise, by which gas acquired by National Fuel for its system and available to National Fuel at one point is made available to National Fuel at a different point .

transportation costs allocated to applicable rate schedules as calculated under subparagraph (b) above, by (ii) estimated annual rate design determinants applicable to affected zones and rate schedules. The Unit Transportation Cost will be rounded to the nearest 1/100 of a cent.

(d) Commencing November 1, 1980, and continuing until the expiration of the Stipulation and Agreement of which this Article V is a part, National Fuel shall maintain a Deferred Transportation Cost Account reflecting the undercollection or overcollection of Transportation Costs for each monthly billing period. Each month all Transportation Costs incurred by National Fuel shall be debited to this account and all Transportation Costs recovered by National Fuel shall be credited to this account. Transportation Cost recoveries will be determined by multiplying

the transportation component (Unit Transportation Cost and Commodity Transportation Surcharge Adjustment) of each of National Fuel's sales rates by the monthly billings at each rate. Upon expiration of the Stipulation and Agreement, the balance of the Deferred Transportation Cost Account will be transferred to Account No. 191, Deferred Purchased Gas Costs.

(e) The Transportation Commodity Surcharge Adjustment shall be computed in the same manner as the Purchased Gas Surcharge Adjustment contained in Section 17 of National Fuel's currently effective tariff.

(f) The Current Unit Transportation Cost computed in accordance with subparagraph (d) and the Transportation Commodity Surcharge computed in accordance with subparagraph (e) above shall be added to National Fuel's rates, and the last previous

Unit Transportation Cost and Transportation Commodity Surcharge computed under the same subparagraphs, which is contained in such rates, if any, shall be removed. In the event a change in rates under the provisions of this Article is prevented by law from going into effect on a date specified herein, it shall be made effective as soon thereafter as permitted by law.

(g) Not less than thirty (30) days prior to the proposed effective date of a rate change pursuant to this Article, National Fuel shall file with the Commission and shall mail to each of its jurisdictional customers, parties to this proceeding, and interested state commissions, revised tariff sheets reflecting the proposed rate change together with a statement showing the computation of the rate change.

ARTICLE VI

Termination of Other Proceedings

On February 4, 1980, the Commission accepted for filing and suspended subject to refund National Fuel's proposed tariff sheets filed pursuant to its Purchased Gas Adjustment ("PGA") clause at Docket No. TA80-1-16 (PGA80-2 & IPR80-2) for consideration of the storage accounting issue. Subsequently, in Docket No. TA80-2-16 (PGA80-3 & IPR80-3) and Docket No. TA81-1-16-001 (PGA81-1 & IPR81-1), the Commission accepted, subject to refund, National Fuel's semi-annual PGA filing for review of the same issue (Orders issued July 31, 1980 and January 30, 1981, respectively).

It is stipulated and agreed that the proceedings and refund liability established by the suspension orders in the three above-captioned proceedings are to be terminated as a non-severable condition of the settlement of the issues in these

dockets. Accordingly, the parties require that the order approving this Stipulation and Agreement specifically direct the termination of the PGA suspension orders in the above-captioned proceedings without limitation or qualification.

ARTICLE VII

Minimum Btu Content

It is stipulated and agreed that the General Terms and Provisions of National Fuel's tariff will be amended to provide for a minimum Btu content of 985 Btu, except for gas received from Columbia Gas Transmission Corporation at several delivery points where the gas is not commingled with National Fuel's general system supply.

ARTICLE VIII

Federal Income Tax

If at any time during the term of this Stipulation and Agreement, the cur-

rent statutory Federal Income Tax rate should be changed by legislation (including, but not limited to, an increase or reduction of the basic tax rates, imposition of a surcharge, or enactment of legislation having the effect of a change in the said current tax rate or rates), then such change or changes shall be reflected by upward or downward adjustment, as appropriate, in National Fuel's jurisdictional rates.

Any such increase or decrease shall be made effective as of the first day of the month following the effective date of the change in the tax rate (or surcharge thereon). Tariff sheets reflecting such changes must be filed no later than forty-five (45) days after the enactment or effective date, whichever is later, of the law changing the Federal Income Tax rate (or surcharge thereon). For periods prior

to the effective date of such filing, National Fuel shall calculate the increase or decrease caused by the change and recover any increase by a surcharge to be imposed over a one-year period or by immediate refund in the case of a tax rate reduction.

ARTICLE IX

Full Tax Normalization

The parties to this Stipulation and Agreement agree that the comprehensive inter-period allocation of income taxes is to be employed by National Fuel. Accordingly, all plant additions made subsequent to November 1, 1980, will be handled in accordance with comprehensive inter-period allocation of income taxes.

The parties recognize that the tax effect of the difference between (1) remaining book depreciation on existing plant; i.e., plant in service as of Novem-

ber 1, 1980, and (2) remaining tax depreciation of existing plant, is not fully reflected in the balance of Account No. 282 to the extent it relates to depreciable property. This deficiency equates to $33,719,292 of remaining net depreciable book plant over the remaining net depreciable plant, which when amortized over 10 years would amount to $3,371,929 annually. In conjunction with the adoption of comprehensive inter-period allocation of income taxes for plant additions made subsequent to November 1, 1980, as described in the preceding paragraph the parties agree that, with regard to plant additions made prior to October 31, 1980, cost of service Federal Income Tax allowance will reflect a pro rate portion of $33,719,292, such portion to be based on an amortization period of 10 years or until the deficiency is fully funded. Cor-

respondingly, each year National Fuel will debit or credit, as appropriate, accumulated deferred income taxes with the tax effect of the difference between (1) actual book depreciation less $3,371,929, and (2) actual tax depreciation. The calculation of the Federal Income Tax allowance in the cost of service shown on Appendix A includes an add-back of $3,371,929 to reflect the agreed method of progressing to the point where the full tax effect of the difference between book and tax basis of property will be reflected in the deferred tax accounts.

Starting with National Fuel's next rate case and all future rate case thereafter, the tax allowances for National Fuel shall be computed reflecting the book depreciation rate times the equity portion of the Adjustment for Funds Used During Construction ("AFUDC") applicable to gas

utility plant additions subsequent to November 1, 1980, as an add-back to the return allowance.

The settlement cost of service agreed to for purposes of implementing this Stipulation and Agreement utilizes, as detailed above, the "South George" method to amortize National Fuel's future unfunded tax liability as part of the comprehensive inter-period allocation of income taxes. National Fuel has agreed to the allocation of taxes on this basis subject to National Fuel's receiving an opinion from the FERC Office of Chief Accountant affirming that maintenance of deferred tax accounts by vintage years is not required and with the express understanding that the use of the comprehensive inter-period allocation methodology, including the use of the "South Georgia" method, will not preclude or otherwise impair or prejudice its right

to use accelerated tax depreciation including Asset Depreciation Range System ("ADR") for Federal Income Tax purposes. Should the Internal Revenue Service issue a tax ruling in the future directly affecting National Fuel or of general applicability which would preclude or otherwise impair its right to use accelerated depreciation or ADR as a result of the procedures adopted herein, National Fuel shall have the right to file and make an appropriate adjustment in its charges or rates as applicable in order to continue the use of accelerated and ADR tax depreciation.

Any undercollections by National Fuel from November 1, 1980, to the effective date of said revised rates, including interest thereon as prescribed by Section 154.67 of the Commission's Regulations, shall be collected through a special surcharge over a twelve-month period. Any

overcollections by National Fuel during such period will be refunded with interest as prescribed by Section 154.67 of the Commission's Regulations. Further, should the Commission as a result of a remand of Order No. 530, et al., depart from such order in any manner, National Fuel will be permitted to make appropriate adjustments, if any, to Account No. 191 to avoid under-collections.

ARTICLE X

IRS Refunds

In order to settle the controversy as to whether National Fuel should be required to flow through to its customers the IRS tax refunds received in calendar years 1972 and 1973 as a result of National Fuel's election to utilize guideline Class Life Depreciation, National Fuel will, effective November 1, 1980, cease amortizing the unamortized portion of

these refunds to Account 411 and will restate Account No. 282 to credit $5,86,536 in full settlement of the IRS refund issue. This Article will survive the term of this Stipulation and Agreement as set forth in Article XII below.

Further, it is stipulated and agreed that the resolution on this issue does not violate National Fuel's authorization rendered by the FERC Chief Accountant, issued February 8, 1973, to credit Account No. 282 with those IRS refunds and to amortize those amounts to Account No. 411 over a fifteen-year period.

ARTICLE XI

Effectiveness

Neither this Stipulation and Agreement nor any of the provisions hereof shall become effective unless and until each of the following shall have occurred:

1. The Commission shall have entered a final order approving all of the terms and provisions of this Stipulation and Agreement without modification or condition, which order shall have become final and nonappealable within forty-five (45) days from the date this Stipulation and Agreement is submitted to the Commission for approval; provided that National Fuel may waive the requirements (in whole or in part) that the Commission's order become final and nonappealable.

2. The Commission's order referred to in Paragraph 1 immediately above shall have waived compliance by National Fuel with the requirements of the Commission's Regulations, including, but not limited to, Part 154 thereof, to the extent necessary to effectuate all of the provisions of this Stipulation and Agreement, and such order shall have provided that rate

increases and reductions made pursuant to this Stipulation and Agreement shall be permitted to become effective as of the dates specified herein without suspension or condition.

ARTICLE XI

Term

Subject to the conditions contained herein, this Stipulation and Agreement shall be effective as of November 1, 1980, and shall terminate on the date that a general rate increase filing by National Fuel under Section 4 of the Natural Gas Act (except for rate changes filed by National Fuel pursuant to the provisions hereof) is made effective or on the effective date of any change in rates resulting from any rate proceeding under the Natural Gas Act instituted against National Fuel, whichever shall first occur.

Notwithstanding anything herein to the contrary, the agreement set forth in Articles IX and X shall survive the termination of this Stipulation and Agreement and shall continue in effect in accordance with the provisions of Article XIII below.

ARTICLE XIII

Reservations

This Stipulation and Agreement is made pursuant to Section 1.18(e) of the Commission's Regulations, and if it is not accepted in its entirety without condition, it shall be privileged and of no effect.

This Stipulation and Agreement represents a compromise in an effort to conclude all the issues in this rate proceeding and by approving, agreeing to, or not opposing this Stipulation and Agreement, no party shall be deemed to have accepted, agreed, or consented to any theory or

principle or data underlying or which may be asserted to underlie this Stipulation and Agreement. In addition, no party to this proceeding shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein. It is further specifically understood and agreed that this Stipulation and Agreement represents a negotiated dollar settlement with respect to National Fuel's rates, and neither National Fuel, the Commission, its Staff, nor any other person shall be deemed to have approved, accepted, agreed or consented to any rate-making principle or any method of cost of service determination or rate design or any allocation underlying or supposed to underlie any of the rates or refunds provided for herein, except that the agreements set forth in Articles IX and X above, shall have the

same binding effect as a final Commission order on the rate-making principles involved.

Moreover, it is stipulated and agreed that all parties reserve their right to a hearing in the event that this Stipulation and Agreement is not approved in its entirety without conditions.

Dated this 20th day of February, 1981.

FEDERAL ENERGY REGULATORY COMMISSION
Washington 20426

In Reply Refer To:

OPPR-Cost of Service Branch
National Fuel Gas Supply Corporation
Docket Nos. RP80-95
TA80-1-16 (PGA80-2 and IPR80-2) TA80-2-16 (PGA80-3 and IPR80-3)
TA81-1-16-001 (PGA81-1 and IPR81-1)

April 21, 1981

National Fuel Gas Supply Corporation

10 Lafayette Square
Buffalo, New York 14203

Attention: Mr. Richard M. DiValerio
Secretary and General Counsel

Reference: Stipulation and Agreement
in Docket No. RP80-95

Gentlemen:

On March 11, 1981, a Stipulation and Agreement proposed by National Fuel Gas Supply Corporation (National) was certified to the Commission. The terms of the agreement represent an uncontested settlement reached between National Fuel, the Commission's Staff, and parties. If, accepted, the Stipulation and Agreement would resolve all issues in Docket Nos. RP80-85, TA80-1-16 (PGA80-2 and IPR80-2), TA80-2-16 (PGA80-3 and IPR80-3), and TA81-1-16-001 (PGA81-1 and IPR81-1). No comments opposing the settlement have been received. The Commission finds the proposed settlement to represent a reasonable

resolution of the issues in this proceeding and that it is in the public interest. Therefore, the proposed Stipulation and Agreement is hereby accepted and approved.

The Settlement

The Settlement provides for a cost of service of $439,788,329 exclusive of the New York Gross Receipts Tax. National Fuel has agreed that if annual sales exceed 175,000,000 Mcf, it will refund the additional revenues less any cost of service increases experienced in the ensuing 12 month period.

A transportation tracking provision provides that National Fuel will credit Account No. 191 with the revenues received under existing transportation agreements exclusive of, inter alia, revenues received for transportation of gas pursuant to Part 284 of the Commission's Regulations and revenues related to services

reflected in credits to the costs of service. Further, tracking provision permits National Fuel to modify its rates to reflect increases or decreases in the costs paid to others for transportation arrangements.

The Stipulation and Agreement also requires the termination of the refund liability and the proceedings at Docket Nos. TA80-1-16 (PGA80-2 and IPR80-2), TA80-2-16 (PGA80-3 and IPR80-3), and TA81-1-16-001 (PGA81-1 and IPR81-1) as a non-severable condition of the settlement of the issues in Docket No. RP80-95.

Any increase or decrease in the Federal income tax rate shall be reflected by upward or downward adjustments to National Fuel's jurisdictional rates.

National Fuel will employ a comprehensive interperiod allocation of income taxes subject to receipt of an opinion

from the FERC Office of Chief Accountant affirming that the maintenance of deferred tax accounts by vintage years is not required and with the understanding that if the Internal Revenue Service (IRS) should issue a ruling which would preclude or impair the use of accelerated depreciation of the Asset Depreciation Range System, National Fuel will have the right to file appropriate adjustments.

The settlement also provides for appropriate treatment of refunds received by National Fuel from the IRS in 1972 and 1973 attributable to its election to utilize Class Life Depreciation.

This letter order is without prejudice to any findings or orders which may hereafter be made by the Commission, and is without prejudice to any claim or contentions which may be made by the FERC, the Staff or any other party or person

affected by this order in any proceedings now pending or hereafter instituted by or against National Fuel. Acceptance of the agreement shall not constitute approval or precedent regarding any principle or issue in this proceeding.

By direction of the Commission.

Secretary

Attachments

April 30, 1982

Mr. Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: National Fuel Gas Supply Corporation, Docket No. _____

Dear Mr. Plumb:

National Fuel Gas Supply Corporation ("National Fuel"), pursuant to Section 4 of the Natural Gas Act ("Act"), the Natural Gas Policy Act of 1978 ("NGPA"), the

Commission's Regulations, and Section 17 of the General Terms and Conditions of its FERC Gas Tariff, Original Volume No. 1, hereby tenders for filing Second Substitute Thirty-seventh Revised Sheet No. 4, to be effective June 1, 1982.

The purpose of this tariff sheet is to revise National Fuel's FERC Gas Tariff, Original Volume No. 1, to the limited extent necessary to implement the recent decision of the United States Court of Appeals for the Fifth Circuit in Mid-Louisiana Gas Company v. Federal Energy Regulatory Commission, 664 F.2d 530 (5th Cir. 1981), reh. denied March 2, 1982. Therein, the court vacated Commission Order Nos. 58 and 98 and found that "* * * the intracorporate transfer from the production division of the pipeline to the transportation division of the pipeline would constitute the first sale. * * *"

Consequently, "* * * [t]reating the intra-corporate transfer as a first sale would establish the 'cost' of the pipeline's own production to the pipeline at NGPA prices, just as the cost of independently produced gas to the pipeline is calculated. * * *" Id. at 536, 538.

The tariff sheet herein tendered increases the Cost of Gas from Pipeline and Producer Suppliers under Rate Schedules G-1, G-1A, and I-1 by an additional 8.69¢ per Mcf. This increase in cost of gas purchased sold results from pricing National Fuel's pipeline production at the applicable NGPA prices. Moreover, in calculating this increase, National Fuel has utilized its February 1, 1982, purchased gas adjustment ("PGA") filing with the exception of revisions to Sheets 1 and 2 of Schedule 1 thereto and the addition of Sheet 2A. These modifications are at-

tached hereto. Otherwise, National Fuel incorporates herein by reference its PGA filing made effective February 1, 1982.

National Fuel respectfully requests that the Commission grant whatever waivers of its regulations as are required in order to permit this tariff sheet to become effective as proposed and respectfully submits that such waivers must be granted by the Commission to comply with the Court's mandate in Mid-Louisiana, supra. National Fuel acknowledges that the proposed effective date is not concurrent with its PGA filing on February 1, 1982, but submits that good cause exists for a one-time waiver of this requirement. In this regard, National Fuel submits that this request is similar to the Commission's order which permitted pipeline companies to file PGA changes out of time to

reflect refunds of the Louisiana First Use Tax.

Should the Commission decide that additional time is required for a complete evaluation of this filing, National Fuel would suggest that the Commission allow the rates to become effective on June 1, 1982, upon one (1) days's suspension and subject to refund or, in the alternative, accept a corporate undertaking from National Fuel that the appropriate refund, if any, would be made pursuant to any Commission order requiring same. In this regard, on December 31, 1981, the Commission accepted for filing and suspended until June 1, 1982, a major rate increase proposed by National Fuel at Docket No. RP82-13. Therein, National Fuel reflected the price of its production on a cost-of-service basis. National Fuel hereby represents as a corporate undertaking that it

will file before June 1, 1982, revised tariff sheets which will reflect the elimination from the rates proposed at Docket No. RP82-13 the costs associated with National Fuel's pipeline production if this filing is permitted to be effective on June 1, 1982, subject to refund. Moreover, National Fuel also represents that it will not oppose an effort to consolidate this filing with Docket No. RP82-13 for consideration of this common issue.

Furthermore, National Fuel expressly reserves the right to collect NGPA rates from November 1, 1978 to June 1, 1982, for all qualifying production. National Fuel is continuing its efforts to assemble and verify all necessary production, well category and other data as may be required to implement NGPA pricing in accordance with Mid-Louisiana, supra, from November 1, 1978. In any event, nothing contained

herein shall be construed as a waiver on behalf of National Fuel of its right to collect forward from December 1, 1978 any amounts that are subsequently determined by the Commission and/or the courts to be applicable to a pipeline's own production nor the right to collect carrying charges applicable thereto.

Copies of this letter of transmittal and enclosures are being mailed to each of National Fuel's jurisdictional customers and interested state commissions as shown on the attached list. Also, copies of this filing have been posted and are available for inspection during regular business hours at National Fuel's main office in Buffalo, New York.

In accordance with the Commission's Regulations, there is enclosed a proposed form of notice suitable for publication in the Federal Register.

Communications concerning this filing should be addressed to the undersigned, and also to Mr. Kenneth R. Smathers, Assistant Treasurer, National Fuel Gas Supply Corporation, 10 Lafayette Square, Buffalo, New York 14203.

Respectfully submitted,

NATIONAL FUEL GAS SUPPLY CORPORATION

By_____
George L. Weber
Its Attorney

Attachments

July 1, 1983

Mr. Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: National Fuel Gas Supply Corporation, Docket No. TA83-2-16-000

Gentlemen:

National Fuel Gas Supply Corporation ("National Fuel"), submits herewith for filing, pursuant to Article 17 (PGA) of the General Terms and Conditions of its tariff, six (6) copies of Forty-Third Revised Sheet No. 4 of National Fuel's FERC Gas Tariff, Original Volume No. 1. This tariff sheet is proposed to be effective August 1, 1983 superseding Substitute Forty-Second Revised Sheet No. 4.

The net increase reflected on Forty-Third Revised Sheet No. 4 is 3.51¢ per Mcf. This increase consists of a decrease in current purchase gas cost surcharge adjustment of 33.88¢ per Mcf.

The current purchase gas cost adjustment of (29.87¢) per Mcf, as calculated on Schedule 1, provides for an annual decrease of $48,505,265 due to changes in pipeline and producer rates effective August 1, 1983, and the inclusion of the

Company's own production at NGPA prices at August 1, 1983 net of the Cost of Service associated with production.

The proposed rates at August 4, 1983 for Tennessee Gas Pipeline Company ("Tennessee") are based upon the fully filed rates in RP83-47 plus the July 1, 1983 PGA rather than the rates which will become effective in that proceeding upon motion by Tennessee. National Fuel requests a waiver of the Commission's regulation to allow the inclusion of this Tennessee rate which will become effective on August 4, 1983. This waiver is necessary since Tennessee supplies approximately half of National Fuel's gas and the exclusion of this rate would create an extreme hardship for National Fuel. In the event the proposed rates at August 1, 1983 used in this filing differ from the actual rates effective August 4, 1983, National Fuel will

file revised tariff sheets to reflect the actual rates when known.

On December 2, 1982, the Commission issued an "Order on Rehearing Modifying Prior Order" in National Fuel Gas Supply Corporation, Docket No. RP82-87-001, wherein the Commission found that no impediments exist to bar National Fuel from repricing its pipeline production on a NGPA basis as of June 1, 1982. Moreover, the Commission stated that "* * * National Fuel is permitted to recoup all increased purchased gas costs incurred during the maximum period * * *" by accruing such amounts in its Account No. 191 and collecting these costs through a subsequent surcharge. National Fuel has not included the surcharge in this filing.

However, National Fuel respectfully requests waiver of Article 17, Section 3.4 of the General Terms and Conditions of its

FERC Gas Tariff relating to the 30-day notice requirement in order to file an amendment to this filing which will reflect this surcharge. In this regard, National Fuel submits that good cause exists to waive this provision and permit the filing of an amendment on July 15, 1983, since the Commission conditioned the above noted authorization on, inter alia, the final action of the U.S. Supreme Court in Mid-Louisiana Gas Company v. FERC, 664 F.2d 530 ("Mid-La") (5th Cir. 1981), mandate issued and rehearing denied, March 2, 1982, cert. granted, 51 U.S.L.W. 3253, October 4, 1983 (Nos. 81-1889, et al.), and since the Court decided Mid-La on June 28, 1983. It was administratively impossible for National Fuel to include the Mid-La surcharge in this filing on such short notice. Thus, National Fuel will amend this filing as soon as possible, but

not later than July 15, 1983, to recoup the revenues together with interest associated with pipeline production for that period.

National Fuel, moreover, continues to reserve its right to collect the revenues associated with pipeline production for the period from December 1, 1978, to June 1, 1982. National Fuel has not yet put these costs into its purchased gas account because it was legally barred from effecting this action before March 2, 1982, by prior actions of this Commission. Since that time, National Fuel has not filed in order to avoid burdening the Commission, or the ratepayers, with costs associated with processing such filings when they could have been reversed by action of the U.S. Supreme Court. Now that the Court has acted, National Fuel intends to file for such revenues when it has collected the

necessary information to submit such a filing and will, at that time, request the Commission to waive its regulations to permit an out-of-period PGA filing relating to such revenues.

The purchase gas cost surcharge adjustment provides for an increase of 33.38¢ per Mcf resulting from the elimination of the currently effective surcharge of (9.49¢) which will expire July 31, 1983, and the inclusion of a 23.89¢ surcharge for amortizing the Account 191 balance as of May 31, 1983.

The calculation of the current surcharge of 23.89¢ for amortizing the $21,000,627.71 accrued in Account 191 as of May 31, 1983 is shown on Schedule 2. An over- or undercollection resulting from the currently effective surcharge due to expire July 31, 1983 will be handled with the February 1, 1984 calculations.

This filing contains no reference to incremental pricing as all of National Fuel's customers resell the gas in states that have zeroed their MSAC's.

If any of National Fuel's supplier rates as billed are different than the rates included in this filing, National Fuel proposes to accrue the difference in Account 191 - Unrecovered Purchased Gas Cost.

National Fuel respectfully requests waiver of any of the Commission's other rules and regulations as may be required to permit Forty-Third Revised Sheet No. 4 to be effective August 1, 1983.

There are enclosed six (6) copies of the proposed Notice suitable for publication in the Federal Register.

Also enclosed is a list of names and addresses of purchasers and interested State Commissions to whom the filing has

been mailed. Copies of this filing are available for public inspection at National Fuel's main office, 308 Seneca Street, Oil City, Pennsylvania, 16301.

Communications concerning this filing should be addressed to the following:

Richard M. DiValerio
Secretary and General Counsel
National Fuel Gas Supply Corporation
10 Lafayette Square
Buffalo, New York 14203

and

McGee & Ketcham, P.C.
1019 Nineteenth Street, N.W.
Washington, D.C. 20036

Respectfully submitted,

NATIONAL FUEL GAS SUPPLY CORPORATION

By_____
George L. Weber
Its Attorney

NATIONAL FUEL GAS SUPPLY CORPORATION	Sixth Revised Sheet No. 35
FERC Gas Tariff Original Volume No. 1	Superseding Fifth Revised Sheet No. 35

GENERAL TERMS AND CONDITIONS

17. PURCHASED GAS COST ADJUSTMENT

The rates for Seller's jurisdictional sales shall be adjusted from time to time to reflect changes in Seller's cost of purchased gas in accordance with the procedures herein specified.

1. Filing of Purchased Gas Cost Rate Adjustment

1.1 Effective Rate After Purchased Gas Cost Rate Adjustment: The effective rates under Seller's Rate Schedule as contained in Volume No. 1 of Seller's FERC Gas Tariff shall be Rates After Current Adjustment for each rate schedule shown on Seller's currently effective Tariff Sheet No. 4. For each rate schedule, the Rates

After Current Adjustment shall be the Base Tariff Rates in effect on the effective date of this Article 17 (or any superseding Base Tariff Rates which become effective without resort to this Article 17) adjusted to reflect rate adjustments under this Article 17.

1.2 Effective Date of Adjustment: The Effective Date of Adjustment for each rate adjustment filed pursuant to Sections 2 and 3 hereof shall be February 1 or August 1 of each year.

1.3 Filing Procedure: At least thirty days prior to the Effective Date of Adjustment, Seller shall file with the Federal Energy Regulatory Commission and post, as defined by Section 154.16 of the Commission's Regulations, a Notice of Purchased Gas Cost Adjustment Rate Change in

the form of revised Tariff Sheet No. 4, showing for Seller's applicable Rate Schedule, the Base Tariff Rate and the Rates After Current Adjustment reflecting the Current Purchased Gas Cost Rate Adjustment and the Surcharge for Amortizing the Unrecovered Purchased Gas Cost Account determined in accord with this Article 17. Such filing shall include computations of the Current Purchased Gas Cost Rate Adjustment filed pursuant to Section 2 hereof and the Surcharge for Amortizing the Unrecovered Purchased Gas Cost Account filed pursuant to Section 3 hereof, as appropriate. Such filing shall be in lieu of any other rate change filing required by the Commission's Regulations under the Natural Gas Act. The filing or making effective by Seller of rate

changes under procedures other than this Article 17 shall have no effect upon the right and duty of Seller to make changes under this Article 17.

Issued by: B. J. Kennedy
President

Effective: December 1, 1979

Issued on: November 1, 1979

NATIONAL FUEL GAS SUPPLY CORPORATION
FERC Gas Tariff
Original Volume No. 1

Sixth Revised Sheet No. 36
Superseding
Fifth Revised Sheet No. 36

GENERAL TERMS AND CONDITIONS

2. Determination of Current Purchased Gas Cost Rate Adjustment

2.1 Current Purchased Gas Cost Rate Adjustment: The Current Purchased Gas Cost Rate Adjustment shall be determined by dividing (1) the Change in System Cost of Purchased Gas by (2) Seller's estimated total system sales for the PGA period (the twelve month period ending not more than 4

months prior to the Effective Date of Adjustment). The resulting quotient stated to the nearest one-hundredth cent shall be the adjustment applicable to the commodity in the Rate Schedule in Volume No. 1, Seller's FERC Gas Tariff. A Current Purchased Gas Cost Rate Adjustment shall not be filed unless the amount thereof as thus determined is at least one-tenth cent per Mcf.

2.2 Change in System Cost of Purchased Gas: The Change in System Cost of Purchased Gas shall be determined by multiplying (1) the total volumes of gas which Seller anticipates purchasing during the PGA period, based on the total volumes purchased by Seller during a twelve month period ending not more than four months prior to the Effective

Date of Adjustment as recorded in FERC Account Nos. 800 through 803, adjusted for new purchases of natural gas attached to Seller's system as of the Effective Date of Adjustment and significant changes in the level of purchases for existing gas suppliers and the estimated volumes for the PGA period to be recorded in FERC Account Nos. 806, 808 and 809, by (2) the difference determined by subtracting the Base Cost of Purchased Gas from the Current Average Cost of Purchased Gas.

2.3 Base Cost of Purchased Gas: The Base Cost of Purchased Gas shall be the Current Average Cost of Purchased Gas which is reflected in Seller's rates in effect at the time of the filing of the Current Purchased Gas Cost Rate Adjustment. The Current

Average Cost of Purchased Gas reflected in Seller's Rates After Current Adjustment shall be stated on Tariff Sheet No. 4.

2.4 Current Average Cost of Purchased Gas: The Current Average Cost of Purchased Gas for each filing under Section 2 hereof shall be determined by utilizing (1) estimated supplier's rates effective during the PGA period based on the rates suppliers will be permitted to charge under the provisions of the Natural Gas Policy Act of 1978 and (2) volumes which Seller anticipates purchasing during the PGA period, based on the total volumes purchased during a six month period ending not more than four months prior to the Effective Date of Adjustment as recorded in FERC Account Nos. 800 through 803,

adjusted for purchases of new natural gas suppliers attached to Seller's

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Superseding
Second Revised Sheet No. 36A

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system as of the Effective Date of Adjustment and significant changes in the level of purchases from existing gas supplies. The Cost of Purchased Gas so determined shall be reduced by the total of the Estimated Incremental Pricing Surcharges determined pursuant to Article 19 of the General Terms and Conditions. The quotient resulting from dividing the cost of purchased gas as so reduced by the

anticipated purchase volumes under (2) above shall be the Current Average Cost of Purchased Gas.

3. Determination of Surcharge for Amortizing the Unrecovered Purchased Gas Cost Account

3.1 Unrecovered Purchase Gas Cost Account: For the period beginning with the effective date of this Article 17, Seller shall establish and maintain an Unrecovered Purchased Gas Account. For each month, the balance in such account shall be increased (or decreased) for a positive (or negative) Unrecovered Purchased Gas Cost Change for that month determined pursuant to 3.2 hereof. For each month, the balance in such account shall be decreased (or increased) for a positive (or negative) amount of carrying charges determined pursuant to Section 3.4 hereof. For each

month, the balance in such account shall be decreased (or increased) for a positive (or negative) Recovery of Unrecovered Purchased Gas Costs for that month determined pursuant to Section 3.5 hereof. The balance in the account shall also be adjusted monthly to reflect the transfer at the end of the month of the balance in the Incremental Gas Acquisition Cost Account which Seller maintains pursuant to Article 19 of the General Terms and Conditions. The balance in the account shall be adjusted to reflect Gas Supplier Refunds Subject to Flow-Through which are to be credited to the Unrecovered Purchased Gas Cost Account pursuant to Section 4 hereof. This account shall be maintained by subaccounts for six-month periods. For any partial month, the charges

and credits to the Unrecovered Purchased Gas Cost Account pursuant to Sections 3.2 and 3.7 hereof shall be determined on a pro rate basis.

3.2 Unrecovered Purchased Gas Cost Account: To permit recovery or return of the jurisdictional portion of increases or decreases in all of the cost of Seller's purchased gas chargeable to Account Nos. 800, 801, 802, 803, 804, 805.2, 806 (with respect to non-concurrent deliveries), 808 and 809 of the Uniform System of Accounts Prescribed for Class A and Class B Natural Gas Companies (or revisions thereof) but are not subject to immediate tracking provisions shall be deferred and accumulated in Account 191, 192.1 or 192.2, Unrecovered Purchase Gas Costs, or such other account which may be estab-

lished by the Federal Energy Regulatory Commission. Such account shall be debited or credited, as appropriate, each month for increases or decreases (including the jurisdictional

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FERC Gas Tariff
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portion of refunds as provided in Section 4.1 hereof) in Seller's purchased gas costs and carrying charges as provided in Section 3.6 hereof.

Each applicable six months Seller shall compute either surcharges or surcharge credits to recover or return the balance which has accumu-

lated in the unrecovered purchase gas cost account in the preceding six-month period and shall reflect such surcharges or surcharge credits in its rates on Sheet No. 4. After such surcharges or surcharge credits are approved by the Federal Energy Regulatory Commission, this account shall be debited or credited, as appropriate with contra entries to purchased gas accounts so that the balance accumulated in this account will be collected over the succeeding six-month period. Separate subaccounts shall be maintained for the amounts relating to the period in which the increase or decrease is accumulated and for the collection of purchased gas increases or decreases, as applicable, so as to keep each period separate.

3.3 Reporting Requirements for Rate Change: Seller will file with the Commission, and serve on its customers and interested State Commissions, a report setting forth the computations made in accordance with the foregoing procedure along with revised Sheet No. 4 with rates reflecting such computations.

3.4 Effective Date of Rate Changes: Subject to the provisions of Section 2.1, changes in rates to reflect increases or decreases in the cost of Seller's purchased gas may be filed to become effective on February 1 and August 1 of each year. Seller's revised tariff sheet reflecting such change shall be filed at least thirty (30) days prior to its proposed effective date. Supplier reductions, refunds and billings credits appli-

cable to periods prior to the effective date of a rate change hereunder that are not otherwise reflected in such filing shall be treated as refunds under Section 4.1.

3.5 Actual Average Cost of Purchased Gas: The Actual Average Cost of Purchased Gas for each calendar month shall be based on (1)(a) the actual total cost of purchased gas as recorded in FERC Account Nos. 800 through 803 less amounts recorded in FERC Account No. 805.2 plus (b) the cost of gas withdrawn from underground storage as recorded in FERC Account 808.1 for that month, less (c) the cost of gas injected into underground storage as recorded in FERC Account No. 809 for that month divided by (2) all volumes purchased and withdrawn from storage less all

volumes injected into storage as recorded in FERC Account Nos.

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NATIONAL FUEL GAS SUPPLY CORPORATION
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No. 1

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800 through 803, 808 and 809 for that month.

3.6 Carrying Charges: Carrying charges shall be computed monthly on the net balances in Account No. 191 and the related amounts in Account Nos. 283 or 190, as appropriate, as of the end of the immediately preceding month. For purposes of this Section the net balances shall be exclusive of accumulated net interest cal-

culated under this Section. The rate for computation of carrying charges shall be the current rate of interest on pipeline refunds established by the Commission.

3.7 Recovery of Unrecovered Purchased Gas Cost: The Recovery of Unrecovered Purchased Gas Cost for each month shall be determined by multiplying (1) the Surcharge for Amortizing the Unrecovered Purchased Gas Cost Account in Seller's rates during that month by (2) Seller's total sales during that month. The amounts so determined shall be credited (or debited) for a positive (or negative) amount to the applicable subaccount. At the end of each amortization period any balances in the subaccount for that period shall be

transferred to the then current sub-account.

3.8 Surcharge for Amortizing the Unrecovered Purchased Gas Cost Account: The Surcharge for Amortizing the Unrecovered Purchased Gas Cost Account shall be determined by dividing (1) the Balance in the Unrecovered Purchased Gas Cost Account at the end of a month not more than four months prior to the Effective Date of Adjustment by (2) Seller's estimated total system sales for the PGA period. The resulting quotient stated to the nearest one one-hundredth cent shall be the surcharge applicable to the Seller's rates specified in Section 2.1 hereof.

4. Flow Through of Gas Supplier Refunds

4.1 Flow Through of Supplier Refunds: If a final nonappealable or-

der of the Federal Energy Regulatory Commission results in a refund to Seller after the effective date hereof for gas purchased from any source for which costs have previously been passed on through this Article 17 the jurisdictional portion of such refund (including interest received) shall be passed on to Seller's jurisdictional customers by crediting such refund and applicable interest to the unrecovered purchased gas cost account. Such amounts shall be reflected in Seller's rates as provided in Section 3.2 thereto.

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4.2 Method of Flow-Through of Gas Supplier Refunds Subject to Flow-Through: As to Gas Supplier Refunds Subject to Flow-Through applicable to periods commencing January 1, 1980, Seller shall flow through such refunds by reducing the balance of the Unrecovered Purchased Gas Cost Account by the amount of such refunds at the time of receipt by Seller.

As to Gas Supplier Refunds to Flow-Through applicable to periods prior to January 1, 1980, Seller shall promptly after receipt of such refunds (1) determine the portion thereof allocable to each Buyer on the basis of sales during the period

when the rates which give rise to the refund were in effect and (2) request each of its Buyers to determine and promptly report to Seller the portion of the refund applicable to Buyer which is allocable to non-exempt boiler-fuel users by reducing the balance of the Unrecovered Purchased Gas Cost Account by the amount of such portion. Within twenty days after the receipt of such information, Seller shall flow-through to each Buyer the portion of such refunds allocable to the non-exempt boiler-fuel users served by such customer by a check or credit. Seller shall file with the Federal Energy Regulatory Commission and serve on its affected Buyers and interested State Commission a written report showing the data and computation sup-

porting the flow-through of refunds covered by such report.

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President

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[15 FERC ¶61,058 at 61,124] National Fuel Gas Supply Corporation, Docket Nos. RP80-95, TA80-1-16 (PGA80-2 and IPR80-2), TA80-2-16 (PGA80-3 and IPR80-3), TA81-1-16-001 (PGA81-1 and IPR81-1)

Letter Order

(Issued April 21, 1981)

Kenneth F. Plumb, Secretary.

ON March 11, 1981, a Stipulation and Agreement proposed by National Fuel Gas Supply Corporation (National) was certified to the Commission. The terms of the agreement represent an uncontested settlement reached between National Fuel, the Commission's Staff, and parties. If, accepted, the Stipulation and Agreement would resolve all issues in Docket Nos.

RP80-85, TA80-1-16 (PGA80-2 and IPR80-2), TA80-2-16 (PGA80-3 and IRP80-3), and TA81-1-16-001 (PGA81-1 and IPR81-1). No comments opposing the settlement have been received. The Commission finds the proposed settlement to represent a reasonable resolution of the issues in this proceeding and that it is in the public interest. Therefore, the proposed Stipulation and Agreement is hereby accepted and approved.

The Settlement

The Settlement provides for a cost of service of $439,788,329 exclusive of the New York Gross Receipts Tax. National Fuel has agreed that if annual sales exceed 175,000,000 Mcf, it will refund the additional revenues less any cost of service increases experienced in the ensuing 12-month period.

[61,125] A transportation tracking provision provides that National Fuel will credit Account No. 191 with the revenues received under existing transportation agreements exclusive of, inter alia, revenues received for transportation of gas pursuant to part 284 of the Commission's Regulations and revenues related to services reflected in credits to the costs of service. Further, a tracking provision permits National Fuel to modify its rates to reflect increases or decreases in the costs paid to others for transportation arrangements.

The Stipulation and Agreement also requires the termination of the refund liability and the proceedings at Docket Nos. TA80-1-16 (PGA80-2 and IRP80-2), TA80-2-16 (PGA80-3 and IPR80-3), and TA81-1-16-001 (PGA81-1 and IPR81-1) as a non-

severable condition of the settlement of the issues in Docket No. RP80-95.

Any increase or decrease in the Federal income tax rate shall be reflected by upward or downward adjustments to National Fuel's jurisdictional rates.

National Fuel will employ a comprehensive interperiod allocation of income taxes subject to receipt of an opinion from the FERC Office of Chief Accountant affirming that the maintenance of deferred tax accounts by vintage years is not required and with the understanding that if the Internal Revenue Service (IRS) should issue a ruling which would preclude or impair the use of accelerated depreciation of the Asset Depreciation Range System, National Fuel will have the right to file appropriate adjustments.

The settlement also provides for appropriate treatment of refunds received by

National Fuel from the IRS in 1972 and 1973 attributable to its election to utilize Class Life Depreciation.

This letter order is without prejudice to any findings or orders which have beenmade or which may hereafter be made by the Commission, and is without prejudice to any claim or contentions which may be made by the FERC, the staff or any other party or person affected by this order in any proceedings now pending or hereafter instituted by or against National Fuel. Acceptance of the agreement shall not constitute approval or precedent regarding any principle or issue in this proceeding.

Appendix A

National Fuel Gas Supply Corporation
Docket No. RP80-95
Reconciliation of Cost of Service as Filed to Settlement
Cost of Service

Line No.						
1	Cost of Purchased Gas Sold					
2	Gas Purchased	$394,720,498	$25,635,793	$420,356,291	($46,264,710)	$374,091,581
3	Gas Withdrawn from Underground Storage	77,691,588	1,620,359	79,311,947	(17,833,294)	61,478,653
4	Gas Delivered to Underground Storage	(79,253,856)	(58,091)	(79,311,947)	17,833,294	(61,478,653)
5	Total Gas Purchased Sold	393,158,200	27,198,091	420,356,291	46,264,710	374,091,581
6	Other Operating & Maintenance	36,233,054	(2,441,778)	33,791,276	2,007,196	35,798,472
7	Depreciation, Depletion & Amortization Expense	6,696,216	(255,377)	6,440,839	(182,027)	6,258,812
8	Taxes - Other Than Income Taxes	4,117,306	—	4,117,306	—	4,117,306
9	Taxes - Federal Income	13,940,053	(5,502,062)	8,437,991	1,400,580	9,838,571
10	Taxes - State Income	2,237,121	(877,255	1,359,866	224,767	1,584,633
11	Other Operating Revenues-Cr.	(5,847,402)	—	(5,847,402)	686,956	(5,160,446)
12	Return	20,539,687	(7,315,830)	13,223,857	35,543	13,259,400
13	Total Cost of Service	$471,074,215	$10,805,789	$481,880,024	$ 42,091,695)	$439,788,329

Appendix B

National Fuel Gas Supply Corporation
Docket No. RP80-95
Settlement Rate of Return

National Fuel Gas Supply Corporation
Capitalization Projected as of September 30, 1980

	Amount	Ratio	Cost	Weighted Cost
Long-Term Debt	$209,183,000	48.10%	7.98%	3.84%
Preferred Stock	22,000,000	5.06	9.82	.50
Common Equity	203,685,000	46.84	13.25	6.21
Total Capital	$434,868,000	100.00%		10.55%

[6 FERC ¶61,077 at 61,151] Regulations Implementing the Natural Gas Policy Act of 1978, Docket No. RM79-3

Order Granting Rehearing for Purposes of Further Consideration and Denying Stay

(Issued January 29, 1979)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

On December 29, 1978, Consolidated Gas Supply Corporation (Consolidated) filed an application for reconsideration and stay of Section 270.203 of the Commission's Interim Regulations implementing the Natural Gas Policy Act of 1978 (NGPA). On January 3, 1979, the Commission issued Order No. 21, 1/ which prescribed a Final Regulation providing for a rehearing procedure for rules or orders issued under the NGPA. Inasmuch as there was no specific provision for filing petitions for rehearing of the NGPA Rules at the time this application was filed, we will treat Con-

solidated's application for reconsideration as an application for rehearing under Section 286.102 of our Regulations under the NGPA.

Since the Regulation in question is an Interim Regulation and since the Commission wishes to consider public comments on the validity of all its Interim Regulations, we will grant Consolidated's application for rehearing solely for purposes of further consideration. This action does not constitute a grant or denial of the application on its merits in whole or in part. As provided in Section 1.34(d) of the Commission's Rules of Practice and Procedure, no answers to the applications for rehearing will be entertained by the Commission, since this order does not grant rehearing on any substantive issues.

In support of its motion for stay 2/ applicant states that the Regulation in

question "has the impermissible effect of setting a lower ceiling price than that permitted by the NGPA," and that it would suffer irreparable injury in that it would be permanently deprived of revenues to which it is entitled under the NGPA.

We are unconvinced by Consolidated's allegations of irreparable harm. In the event a court determines that this Regulation is unlawful, this Commission could authorize the collection of revenues denied by this provision through surcharges. 3/ Accordingly, Consolidated has not shown good cause for a stay of §270.203 of the Interim Regulations and we shall deny Consolidated's application for stay.

The Commission orders:

(A) Rehearing is granted solely for purposes of further consideration.

(B) Consolidated's application for stay is denied.

Commissioner Holden voted present.

-- Footnotes --

1/ Docket No. RM79-12, FERC Statutes and Regulations ¶30,032.

2/ Order No. 20, issued in Docket No. RM79-9, FERC Statutes and Regulations ¶30,029, prescribes a procedure for applying for stay of Interim Regulations under the NGPA.

3/ See orders issued June 27, 1978, 3 FERC ¶61,269, in Docket No. AR61-2 et al., and July 31, 1978, 4 FERC ¶61,095, in Docket No. AR69-1.

No. 86-1871

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

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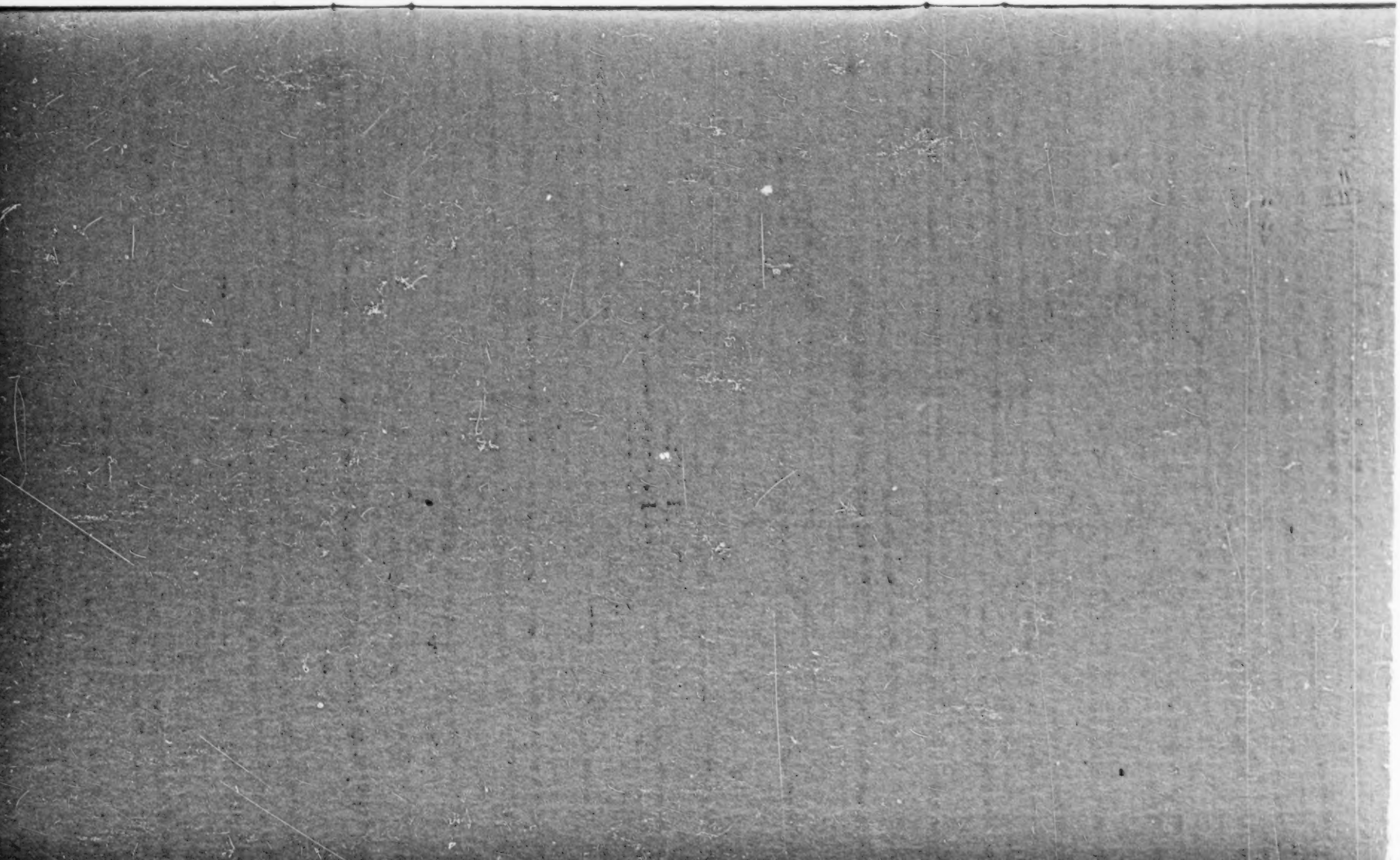

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No. 86-1871

IN THE

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OCTOBER TERM, 1986

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

The intervenor-respondent, Public Service Commission of the State of New York ("New York"), opposes the petition filed by National Fuel Gas Supply Corporation ("petitioner") seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *National Fuel Gas Supply Corporation* v. *Federal Energy Regulatory Commission,* 811 F.2d 1563 (1987); Petitioner's Appendix 1a (hereinafter "Pet. App.").

REASONS FOR DENYING THE WRIT

Both the court below and the Federal Energy Regulatory Commission ("Commission") rejected petitioner's attempt to reprice retroactively the gas it had produced and sold under previously-approved cost-of-service rates to the higher rates available under the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3301-§ 3342. Both the Commission (Pet. App. 23a-24a) and the court (Pet. App. 1a-22a) found that the Commission's 1979 order approving cost-of-service rates for this gas and the 1981 settlement agreement resolving subsequent rate increases on the basis of a continuation of the cost-of-service treatment, in both cases without reserving a right to seek a higher price for the gas should it be

determined in pending litigation that pipelines had a right to such higher prices, precluded the retroactive repricing of this gas.

Petitioner offers three arguments as reasons for granting its petition: (1) the Commission unlawfuly impeded what petitioner views as the unconditional authorization of the NGPA to price the gas at issue at the higher rates it sought; (2) the decision of the court below conflicts with a decision of the Fifth Circuit; and (3) the court improperly gave deference to the Commission's interpretation of a settlement agreement. As will be demonstrated, none of these reasons warrant this Court's plenary review. Instead, this case addresses a specific factual situation, involving particular settlement language, which is of no future significance in the administration of the Natural Gas Act or Natural Gas Policy Act and of no intrinsic importance which would warrant this Court's review.

1. Petitoner argues that the decision below and the Commission's underlying rulings reflect a "steadfast refusal to implement the NGPA consistent with the provisions of the statue and this Court's *Mid-La* [*Public Service Commission of the State of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983)] decision." Petition at 14. Petitioner's contention rests upon the erroneous premise that the Commission was required to price all pipeline production since 1978 at NGPA ceiling prices, regardless of whether the pipeline had agreed to, or accepted lower prices for such gas in intervening rate proceedings.

The court below rejected petitioner's contention. It found no reason to suspect "the Commission has embarked on a deliberate program to sabotage the [NGPA's] provisions or to refuse to carry its mandate." Pet. App. 7a. The court below viewed this Court's *Mid-La* decision as overturning a Commission error of "interpretation" of the NGPA's application to a pipeline's own production which did not resquire retroactive modification of "all of the final rate orders that have been entered over the years since the [NGPA] was enacted." *Id.* This is consistent with normal practice "that a judicial decision should be given prospective effect." *Id.*

Petitoner suggests (petition at 13-14) that the Commission improperly imposed an *ex post facto* condition, *i.e.*, preservation of a pipeline's rights in intervening rate cases, before pipeline production can be priced at NGPA rates. As the court below noted (Pet. App. 7a), the NGPA does not mandate the unqualified application of its ceiling prices in all circumstances. Under the NGPA, parties can still bargain for less than ceiling prices. The Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC*, 780 F.2d

1238, 1242 (1986), similarly recognized that a settlement agreement could expressly bar recovery of NGPA pricing for pipeline production:

> The dispositive issue in this case is whether the 1981 Commission-approved settlement between Mid Louisiana and its customers should be read to preclude Mid Louisana from repricing "old" pipeline production according to the rates allowable under the NGPA.

Accord, Consolidated Gas Supply Corp. v. *FERC*, 745 F.2d 281 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

2. Petitioner asserts that the Fifth Circuit's *Mid Louisiana Gas Co.* decision conflicts with the decision below, even though in both cases "the salient operative facts are identical." Petition at 14. There is no conflict, however, on any question of law. Both courts took the same approach of reviewing the underlying settlement agreement to determine the rights, if any, of the pipeline to reprice its own production at NGPA ceiling prices. The courts reached different conclusions not because of different views as to the governing law, but because their analyses of the separate underlying settlement agreements reached different conclusions.

Contrary to petitioner's assertion (Petition at 15), both courts agreed that a general disclaimer was insufficient by itself to perserve a right to reprice company production. The Fifth Circuit stated, and the court below agreed (Pet. App. 20a), "we are unpersuaded that these provisions of the settlement agreement were specific enough to constitute express references to Mid Louisiana's right to reprice its pipeline production in the event it prevailed in the *Mid-La* litigation." 780 F.2d at 1244.

The court's results differed to the extent that settlement provisions and the surrounding facts differed. *Compare* 780 F.2d at 1244-45 *with* Pet. App. 18a-21a. But even if the two courts had reached divergent conclusions in construing essentially similar fact situations, this would not be a basis for granting the petition. Plenary review by this Court is not warranted merely because the circuits reach contrary determinations as to the meaning of comparable facts, absent a showing — which cannot be made in the instant case — that the underlying issue is one of future significance or national importance.

3. Petitioner asserts that the court below misapplied the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it gave deference to the Commission's decision.

(Petition at 20-24)[1] Petitioner claims that deference should not be given to the Commission's interpretation of the settlement agreement because the Commission, through its staff, was an interested party to the settlement, or because it was biased by its prior position in the *Mid-La* litigation and so interpreted the settlement in a way that "effectively breathed new life into the Commission's unlawful interpretation of the NGPA" (Petition at 23).

Petitoner's unsupported contention of bias is inconsistent with Commission orders in at least two other cases where pipelines claimed to have reserved the right to reprice their own production in the event of a favorable ruling in the *Mid-La* litigation. *Consolidated Gas Supply Corp.* v. *FERC, supra,* 745 F.2d at 246; *Kentucky West Virginia Gas Co.* v. *FERC,* 780 F.2d 1231, 1234 (5th Cir. 1986). Petitioner misses the point of the Commission orders under review. The Commission's interpretation of its prior orders determining just and reasonable rates or approving settlement agreements with respect to petitioner and other pipelines subsequent to this Court's *Mid-La* decision, *supra,* did not involve the substance of the *Mid-La* controversy, but rather whether the pipelines had reserved the right to reprice the gas in a manner different from that provided in the Commission's orders should the pipeline position prevail in the litigation. Where a reservation was found, repricing was allowed. In those cases where a reservation was not found, repricing was not allowed. The Commission's approach is fully consistent with the *Mid-La* decision and the Commission's statutory duties. *See* Pet. App. 53a-55a (Commission explains its duties in interpreting settlements).

Contrary to petitioner's unsupported assertions (Petition 23-24,) the Commission judged the agreement under established statutory and precedential principals. Pet. App. 53a-59a Because the Commission's actions were well within the boundaries of its statutorily-entrusted responsibilities, the *Chevron* principles were properly applied.

[1]But the court below made clear that it would have reached the same result even if it had not afforded deference to the Commission's interpretation. Pet. App. 18a.

CONCLUSION

For the reasons stated, New York urges the Court to deny the petition.

Respectfully submitted,

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OF THE STATE OF NEW YORK

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983), entitles petitioner to a retroactive increase in its natural gas rates.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1871

NATIONAL FUEL SUPPLY CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 811 F.2d 1563. The orders of the Federal Energy Regulatory Commission (Pet. App. 23a-40a, 40a-67a, 67a-84a) are reported at 26 F.E.R.C. ¶ 61,105, 27 F.E.R.C. ¶ 61,111 and 28 F.E.R.C. ¶ 61,102, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1987. The petition for a writ of

certiorari was filed on May 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner operates an interstate natural gas pipeline; it both purchases and produces gas for sale to its customers. This case concerns a dispute over the prices that may be charged by petitioner for natural gas that it produces and sells to its customers.

1. Prior to the adoption of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, the Federal Energy Regulatory Commission regulated the prices charged by natural gas producers, including pipelines producing natural gas, on sales of natural gas in the interstate market. The pre-NGPA regulatory scheme established essentially two categories of pricing for a pipeline's own gas production. First, "old" gas (*i.e.*, gas produced from wells drilled on or before January 1, 1973, or from leases acquired on or before October 7, 1969) was priced on a cost-of-service basis. The cost of service found by the Commission to be just and reasonable under Section 4 of the Natural Gas Act, 15 U.S.C. 717c, was included in the pipeline's rate base and incorporated into the pipeline's rates.

The price for "new" gas (*i.e.*, gas produced from post-January 1, 1973 wells or post-October 7, 1969 leases), on the other hand, was calculated on the basis of "parity pricing." Under this approach, a pipeline's production was priced at the rate that would have been applicable if the gas had been produced by an independent producer.

The Natural Gas Policy Act radically altered the regulatory structure applicable to sales of gas by producers ("wellhead" sales). Under the NGPA,

certain wellhead sales are termed "first sales," and a producer is free to charge any price up to the statutory ceiling price for specified categories of "first sales." See 15 U.S.C. 3311-3319. The NGPA pricing provisions clearly applied to gas produced by independent producers; the question soon arose whether these provisions also applied to natural gas produced by a pipeline and sold to the pipeline's customers. The Commission concluded that gas produced by pipelines did not qualify for "first sale" treatment, and required interstate pipelines to continue pricing their "old" gas under the cost of service approach. See Order No. 58, 44 Fed. Reg. 66577 (1979); Order No. 98, 45 Fed. Reg. 53091 (1980); Order No. 102, 45 Fed. Reg. 67083 (1980).

A number of pipeline-producers sought judicial review of the Commission's determination. The Fifth Circuit held that pipeline production was entitled to "first sale" treatment under the NGPA, and this Court agreed. *Mid-Louisiana Gas Co* v. *FERC*, 664 F.2d 530 (1981), aff'd *sub nom. Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983).

2. During the time that the NGPA pricing issue was in litigation, petitioner sought and received several rate increases. The rates charged by petitioner from December 1, 1978 (the effective date of the NGPA) through October 31, 1980, were the result of a proceeding that culminated in a rate order issued by the Commission. See Pet. App. 111a-123a. One of the issues in that proceeding was the proper method for valuing gas produced by petitioner and sold to its customers. Petitioner argued that all of its own production should be priced on a cost-of-service basis, while the Commission's staff contended

that petitioner's new gas production should be priced at a level equal to gas produced by independent producers. The Commission agreed with petitioner and ordered that the production be priced on a cost-of-service basis (*id.* at 44a-46a).

Petitioner's rates from November 1, 1980 to May 31, 1982 were established in a settlement agreement among petitioner and its customers (Pet. App. 226a-263a). The agreement provided that petitioner's production would be valued on a cost-of-service basis. It contained boilerplate language stating (*id.* at 262a) that neither petitioner nor the Commission or any other party "shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein." And, although the agreement also contained express reservations of petitioner's right to alter its rates upon the occurrence of several contingencies (see *id.* at 240a n.1, 250a-251a, 256a), it did not contain a reservation of petitioner's right to raise its rates retroactively in the event the Commission's interpretation of the NGPA was overturned on judicial review. The discussion of reserved issues in the Commission's order approving the agreement did not refer to the pipeline production issue (*id.* at 263a-268a).

In late 1983, following this Court's decision in *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, *supra*, petitioner sought to reprice its own gas production retroactively for the periods covered by the prior order and settlement—December 1, 1978 to October 31, 1980 ("Period I") and November 1, 1980 to May 31, 1982 ("Period II"). It asserted a right to recover for its own production the higher NGPA prices that this Court had found to be applicable to natural gas produced and sold by a pipeline.

The Commission rejected petitioner's request for a retroactive rate increase. Pet. App. 40a-67a; see also *id.* at 67a-84a (order on rehearing). The Commission first considered petitioner's contention with respect to its period I rates. It observed that those rates had been approved by the Commission in a prior proceeding under Section 4 of the Natural Gas Act, 15 U.S.C. 717c. The Commission noted that some issues in that proceeding had been resolved by settlement, but that "the proper pricing of all of [petitioner's] pipeline production" had been "fully litigated" (Pet. App. 44a, 45a). Before both the administrative law judge and the Commission itself petitioner had argued that its production should be priced on a cost of service basis, and the Commission had agreed with that position (*id.* at 45a-47a).

The Commission stated that its order in the prior rate proceeding was "final and no longer subject to rehearing or judicial review" (Pet. App. 47a). Petitioner "made no effort in [that proceeding], or anywhere else, to preserve its rights to reprice its production for the period from December 1, 1978 * * *, through October 31, 1980, in the event that a reviewing Court would overturn the Commission's orders which were issued after the NGPA became effective governing rate treatment for pipeline production" (*id.* at 47a-48a (footnote omitted)). The Commission concluded that petitioner had presented "no legal or other basis" for reopening that already-final proceeding to permit a retroactive increase in petitioner's rates (*id.* at 48a).

The Commission also denied petitioner's request for a retroactive increase in its rates for period II. The Commission found that "[f]inal rates for this

period were established in a settlement agreement * * * approved by [the] Commission" (Pet. App. 49a). The agreement "reflect[ed] cost-of-service pricing for all of [petitioner's] pipeline production" (*ibid.*) and "[n]o language was included in the settlement agreement reserving [petitioner's] right to impose a surcharge at a later date to, in effect, raise the rates which the Commission had approved for * * * Period II if a reviewing court should reverse or modify the Commission's pipeline production regulations under the NGPA" (*id.* at 50a). The Commission concluded that the agreement barred petitioner from retroactively increasing its rates.

3. The court of appeals unanimously affirmed the Commission's determinations (Pet. App. 2a-22a). As to the period I rates, the court stated that "[i]f [petitioner] wished to contest the Commission's position on what constituted 'first sale' gas under the Act, it could have done so before the Commission and, if it did not get satisfaction there, could have brought its contentions before the courts" (*id.* at 6a). Because petitioner "did nothing either to raise this issue itself or to reserve the issue in light of the pending challenges that other parties had brought in other proceedings," its attempt to adjust the rates set in the prior proceeding "several years after [the Commission's order] became final and effective comes too late" (*ibid.*).

The court of appeals also rejected petitioner's claim with respect to the period II rates. The court concluded that it was "bound to give deference to the Commission's reading of the settlement agreement for Period II" and found that the Commission's interpretation of the agreement was "both a reasonable reading and, indeed, a correct one" (Pet.

App. 18a). The court observed that (1) the settlement agreement "expressly stated that it resolved 'all issues now pending before the Commission in the rate proceeding' "; (2) one of the issues in that proceeding was whether petitioner's gas production would be valued on a cost-of-service basis; (3) the settlement agreement specified cost-of-service valuation for petitioner's gas production; and (4) petitioner did not reserve the right to seek adjustments even though challenges to the Commission's interpretation of the NGPA were underway in the courts. *Id.* at 18a-19a (citation omitted). "Under these circumstances," the court of appeals stated, "it seems reasonable for the Commission to conclude that [petitioner's] complete failure to mention this issue constituted implicit acceptance of these rates as final and not subject to retroactive adjustment" (*id.* at 19a (footnote omitted)).

The court found that the settlement agreement's general reservation of rights did not undercut this conclusion. That reservation by its terms applied only to matters " 'not expressly provided for' [in the agreement,]" and "the matter of how to value [petitioner's] own gas production *is* 'expressly provided for' in the agreement" (Pet. App. 20a (emphasis in original; citation omitted)). In addition, the settlement agreement included three provisions in which petitioner expressly reserved its right to adjust rates if specified contingencies occurred. The court found these provisions demonstrated that petitioner "knew how to reserve issues that had a bearing on the rates applicable to its own gas production, even if those reservations might cost [petitioner] valuable benefits in the settlement negotiations. Together, they make it very difficult to read this agreement as reserving

through silence the right to claim a retroactive adjustment on a prominent issue that was being fought out in the courts during the very period in which this agreement was reached" (*id.* at 21a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. Petitioner first contends (Pet. 9-14) that the Commission and the court of appeals erred by even considering whether the order and the settlement agreement reserved to petitioner the right to increase retroactively its rates for periods I and II. In petitioner's view, this Court's decision in *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983), itself requires the Commission to reopen *all* rate proceedings so that every pipeline producer may retroactively recover the higher rates authorized under the Natural Gas Policy Act. Petitioner's startling view of the finality of administrative proceedings is simply wrong.

This Court's decision in *Mid-Louisiana Gas Co.* does not by its terms require the Commission to modify retroactively every final rate order that reflected the Commission's erroneous interpretation of the NGPA's "first sale" standard. "Without any such explicit command," the court of appeals correctly observed, "the usual presumption is that a judicial decision should be given prospective effect except in the particular case in which the ruling is made." Pet. App. 7a; cf. *Griffith* v. *Kentucky*, No. 85-5221 (Jan. 13, 1987) (considering whether *Bat-*

son v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), should be applied retroactively to *pending* cases).

This general principle is expressly embodied in the Natural Gas Act. Section 19 of that statute, 15 U.S.C. 717r, provides that judicial review of an order issued by the Commission is available only if the aggrieved party files a petition for rehearing within 30 days after the issuance of the order and then files a petition for review in a court of appeals within 60 days after the denial of the rehearing petition. If further review is not sought, the order becomes final and is no longer subject to review.[1]

Moreover, this Court has made clear that statutory authorization for increased rates cannot override a contract that limits the rates that may be charged by a gas producer. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Indeed, Congress specified that the prices authorized by the NGPA "are ceiling prices only. In no case may a seller receive a higher price than his contract permits" (S. Conf. Rep. 95-1126, 95th Cong., 2d Sess. 74 (1978)). Since a settlement agreement is no less binding than any other contract, petitioner could not recover the higher NGPA rates if those rates are precluded by the settlement agreement. See *Mid Louisiana Gas Co.* v. *FERC*, 780 F.2d 1238 (5th Cir. 1986) (examining terms of settlement

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[1] In *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958), this Court concluded that the identical provision of the Federal Power Act bars collateral attack in a judicial proceeding upon an order of the Commission that has become final (see 357 U.S. at 335-337). The Court has frequently relied upon its construction of parallel provisions of the Federal Power Act in interpreting the Natural Gas Act. See, *e.g.*, *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

agreement to determine whether retroactive rate increase was permissible); *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281 (4th Cir. 1984), cert. denied, 472 U.S. 1008 (1985) (same). Accordingly, unless petitioner reserved its right to modify the rates established in the prior order and the settlement agreement, petitioner is bound by the order and agreement and may not retroactively increase those rates.

2. The court of appeals correctly concluded that the period I rate order bars petitioner from retroactively adjusting its period I rates. The order finally determined the rates that could lawfully be charged by petitioner during the specified time period. Because petitioner failed to seek review of the Commission's order, and did not otherwise reserve its right to adjust the rates, it may not press such a claim at this late date. 15 U.S.C. 717r; cf. *City of Tacoma* v. *Taxpayers*, 375 U.S. 320, 335-337 (1958).

Petitioner asserts (Pet. 24-28) that the court of appeals' reliance on the prior rate order is misplaced because the order discusses the pricing of petitioner's "new" gas, while petitioner here seeks a retroactive rate increase for its "old" gas. But the Commission's order covered petitioner's "old" as well as "new" gas (see Pet. App. 45a-47a); old gas was not the subject of any discussion because there was no dispute over its valuation.[2] The key fact—undisputed by petitioner—is that petitioner did not challenge the Commission's interpretation of the NGPA. Peti-

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[2] It is not surprising that there was no dispute over the proper valuation of the old gas produced by petitioner; all parties, including petitioner itself, argued that cost-of-service pricing was appropriate.

tioner's attempt to assert such a challenge "several years after [the Commission's] order became final and effective comes too late" (Pet. App. 6a).[3]

3. a. The Commission (Pet. App. 48a-59a) and the court of appeals (*id.* at 9a-21a) also correctly concluded that the period II settlement bars petitioner from retroactively increasing its rates. The settlement agreement expressly states that it resolved "all issues * * * in the rate proceeding" (*id.* at 18a; see also *id.* at 230a). The valuation of petitioner's own gas production was one element of the rates provided for by the settlement agreement, and that production clearly was valued on a cost-of-service basis (*id.* at 18a-19a, 49a-50a).[4] The agreement contains no express reservation of petitioner's right to alter retroactively the valuation of its production if the

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[3] Petitioner's suggestion (Pet. 26-27) that it could not challenge the Commission's interpretation of the NGPA is simply wrong. Like the pipeline-producers who successfully challenged the Commission's interpretation before the Fifth Circuit and this Court (see page 3, *supra*), petitioner could have raised the issue on judicial review. See also *Kansas-Nebraska Natural Gas Co.*, 13 F.E.R.C. ¶ 61,172 (1980), reh'g denied, 14 F.E.R.C. ¶ 62,172 (1981), remanded, No. 81-4116 (5th Cir. July 24, 1985) (challenge to Commission's interpretation of the NGPA).

Petitioner also claims (Pet. 14-15) that the court of appeals' determination with respect to this issue conflicts with the Fifth Circuit's decision in *Mid Louisiana Gas Co.* v. *FERC*, *supra*. But the latter case concerned a settlement and, as the discussion below makes clear, it therefore rests on legal principles that are different from those that apply in the situation where a party failed to challenge a Commission order.

[4] Portions of the settlement agreement and the relevant schedules are reproduced in Appendix C of the Commission's brief in the court of appeals.

Commission's interpretation of the NGPA were overturned on judicial review. The court of appeals properly determined that, in view of the fact that the agreement resolved the question of how to value petitioner's production by adopting the cost-of-service approach, petitioner's "complete failure to mention this issue constituted implicit acceptance of these rates as final and not subject to retroactive adjustment" (Pet. App. 19a (footnote omitted)).

The agreement did contain a general disclaimer provision stating that no party to the agreement "shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein" (Pet. App. 262a). But, as the court of appeals found, "the matter of how to value * * * [petitioner's] own gas production *is* 'expressly provided for' in the agreement" (Pet. App. 20a (emphasis in original)), and the settlement therefore forecloses any claim that petitioner's production should be valued on a basis other than cost of service.

Moreover, the settlement agreement contains three provisions that expressly reserve petitioner's right to adjust its rates upon certain contingencies, none of which relates to the litigation over the pricing of pipeline production.[5] As the court below observed, these express reservations "make it very difficult to read this agreement as reserving through silence the

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[5] The rate of return on refunds mandated by the settlement was made contingent on the outcome of *United Gas Pipe Line Co.* v. *FERC*, 657 F.2d 790 (5th Cir. 1981), then pending on review in the Fifth Circuit (see Pet. App. 240a n.1); and the treatment of certain costs under the tax laws was made contingent on changes in legislation and on rulings from administrative bodies (*id.* at 250a-251a, 256a).

right to claim a retroactive adjustment on a prominent issue that was being fought out in the courts during the very period in which this agreement was reached. Such a reading would mean that silence and explicit reservation in the same document are to be given identical legal effect" (Pet. App. 21a).[6]

Finally, the settlement agreement at issue here contrasts sharply with the agreement entered into by petitioner in connection with its next rate filing. That agreement expressly provided that "issues involving the elimination of production costs from rates and [petitioner's] entitlement to NGPA prices by category are reserved for resolution in this proceeding at some time after the Supreme Court acts in *Mid-La., supra.*" FERC C.A. Br. App. D, at 11. The fact that petitioner did not include a similar express reservation in the prior settlement agreement weighs strongly against a finding that the issue was in fact reserved in the prior agreement. Cf. *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d at 290-291 (where a prior settlement agreement did contain an express reservation, court found that absence of that reservation in subsequent agreement supported conclusion that the issue had not been reserved in the later agreement).

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[6] Petitioner asserts (Pet. 19) that the court of appeals' discussion of the express exceptions violates the *Chenery* doctrine, because the express exceptions were not cited by the Commission in support of its construction of the settlement agreement. See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). But the *Chenery* doctrine does not require an agency to discuss every piece of evidence that supports its reading of a contract on penalty of forfeiting any omitted item as a ground for upholding the agency's decision. Where, as here, a court simply elaborates upon the reasoning of the administrative agency, it does not violate the *Chenery* doctrine.

b. Petitioner contends (Pet. 15-20) that the decision below conflicts with *Mid Louisiana Gas Co.* v. *FERC*, *supra*, in which the Fifth Circuit found that a settlement agreement did not bar a rate increase. Even if the two cases were not distinguishable, the narrow issue of the proper interpretation of a settlement agreement would not warrant review by this Court. But, as we show below, the differing results stem from the particular facts of each case.

First, the court in *Mid Louisiana Gas Co.* based its interpretation of that agreement in part upon the "conduct of the settling parties themselves" (780 F.2d at 1245). Prior to the Fifth Circuit decision overturning the Commission's interpretation of the NGPA, the pipeline stated its intent to seek the higher NGPA rates, and none of the pipeline's customers objected on the ground that the settlement barred that action. Even after the pipeline filed for the rate increase, none of the pipeline's customers argued that the higher rates were barred by the settlement. The *Mid Louisiana Gas Co.* court stated that "[i]f * * * Mid Louisiana had intentionally bargained away this right in settlement * * * , that [settlement] agreement surely would have been raised earlier in objection to the pipeline's obvious attempt to" take advantage of the higher rates available under the NGPA (*ibid.*). No similar course of conduct was proven in the present case; and the absence of that factor explains the different interpretation of the settlement agreement here.

Second, petitioner's subsequent settlement agreement expressly reserving the pipeline production pricing issue also distinguishes this case from *Mid Louisiana Gas Co.*, where the pipeline had not entered into a second settlement that expressly ad-

dressed the question. Indeed, the Fifth Circuit in *Mid Louisiana Gas Co.* relied upon the absence of a second settlement to distinguish *Consolidated Gas Supply Corp.* v. *FERC*, *supra*, where the court of appeals found that the settlement agreement did not preserve the pipeline's right to increase rates. The Fifth Circuit stated that the fact "[t]hat Consolidated expressly preserved the pricing issue in its first settlement, but not in the second, undoubtedly influenced the Fourth Circuit's holding. * * * Here, by contrast, there was no such midstream deletion of language to indicate that the pipeline had 'discarded' the right it so vigorously claimed from the inception of the NGPA" (780 F.2d at 1246). The sequence of events in the present case shows that when petitioner sought to reserve the right to raise its rates it included an express provision in the settlement agreement to do so. The contrasting provisions of the two settlement agreements entered into by petitioner plainly distinguish this case from *Mid Louisiana Gas Co.*

Finally, while both the *Mid Louisiana Gas Co.* agreement and the agreement at issue in the present case contain general reservation clauses stating that the parties did not waive any right except as expressly provided in the agreements, Article I of the instant settlement agreement adopted a cost-of-service price for petitioner's own gas production and did not provide any other basis for pricing the gas (see Pet. App. 232a). Article I of the *Mid Louisiana Gas Co.* settlement agreement, by contrast, provided that "Mid Louisiana's pipeline production is priced at the *Natural Gas Policy Act (NGPA) rates or priced on a cost-of-service basis*" (780 F.2d at 1243 (emphasis added)). Thus, the agreement itself al-

luded to the possibility that the gas would be valued on the basis of the NGPA prices. Because the agreement here did not leave open the possibility of NGPA pricing, it more closely resembles the agreement in *Consolidated Gas Supply Corp.* v. *FERC*, *supra*, which purported to resolve all pricing issues on a cost-of-service basis (see 745 F.2d at 288, 290-291). The Fifth Circuit in *Mid Louisiana Gas Co.* distinguished *Consolidated Gas Supply Corp.* on this ground (see 780 F.2d at 1246), and this factual difference also distinguishes *Mid Louisiana Gas Co.* from the present case.[7]

c. Petitioner also contends (Pet. 20-24) that this Court should grant certiorari to consider whether a reviewing court should defer to an administrative agency's interpretation of a settlement agreement. Some courts, including the court below, have found that such deference is appropriate. See Pet. App. 10a-18a; *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d at 291; see also *Amoco Production Co.* v. *FERC*, 765 F.2d 686, 690 (7th Cir. 1985). Other courts have concluded that deference is not appropriate where the agency has not exercised technical expertise in interpreting the agreement. See *Mid*

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[7] The *Mid Louisiana Gas Co.* court also noted that "the economics of the case" supported the conclusion that the settlement agreement permitted a retroactive rate increase, because the value to the pipeline of NGPA pricing far exceeded the increase in revenues resulting from the higher rates permitted under the settlement agreement (780 F.2d at 1245). The court of appeals in the present case noted that "[b]y contrast, the economics in this case are entirely credible: over nineteen months, the concession [of foregoing NGPA pricing] was worth about $8,000,000, * * * as opposed to a settlement agreement that addressed [petitioner's] attempt to gain about a $28,000,000 increase in rates" (Pet. App. 21a n.7).

Louisiana Gas Co. v. *FERC*, 780 F.2d at 1243; *Cincinnati Gas & Electric Co.* v. *FERC*, 724 F.2d 550, 554 (6th Cir. 1984).

We agree with the court below that the principles announced by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), support a rule according some deference to an agency's interpretation of a settlement agreement, especially where, as here, the agency was required to approve the settlement agreement before it could become effective. However, the present case does not present an opportunity for this Court to address the theoretical differences in the approaches of the various courts of appeals because, although the court of appeals said it was appropriate to give "deference, [but] not abdication" (Pet. App. 18a) to the Commission's reading, it also expressly agreed with that reading.

The court of appeals ruled that the Commission's interpretation of the settlement agreement was "*both* a reasonable reading and, indeed, a correct one" (Pet. App. 18a (emphasis added)). It did not indicate that the standard of review was the determinative factor in its decision, and petitioner does not point to anything in the court of appeals' decision that indicates that the court would have reached a different result if it had concluded that it was inappropriate to defer to the Commission's determination. Moreover, our discussion of the reasons justifying the court of appeals' decision shows that, regardless of the standard of review, there is ample support for the construction of the settlement agreement adopted by both the Commission and the court of appeals. Because the outcome of this case would be the same—affirmance of the judgment of the court of

appeals—regardless of the degree of deference a court of appeals should pay to an agency interpretation of a settlement agreement, the present case is not an appropriate one for consideration of the standard of review issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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